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IN THE

Supreme Court of the United States

No. 549. October Term, 1934.

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,

Appellants,

v.

LAURA A. WASHINGTON, COMPLAINANT AND EDWARD W. WELLS AND RICHARD F. ENNIS, RECEIVERS OF TRUST FUND MORTGAGES AGGREGATING $2,901,236.07,

Appellees.

No. 550. October Term, 1934.

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,

Appellants,

v.

MARY A. O'BRIEN, COMPLAINANT, AND JOHN HEMPHILL AND J. LOUIS BREITINGER, RECEIVERS OF TRUST MORTGAGES AGGREGATING $1,742,404.91,

Appellees.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENTS' BRIEF.

OPINIONS BELOW.

The Opinions of the District Court and of the Circuit Court of Appeals have not been reported. The Opinion of the District Court is printed in the Record at p. 44; the Opinion of the Circuit Court of Appeals at p. 86.

STATUTES INVOLVED.

The Federal Statute involved in this proceeding, and referred to in the courts below, is Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 U.S.C.A., Sec. 41 (1), and is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . is between citizens of different states."

The Pennsylvania statutes involved in this proceeding are the Act of June 18, 1923, P. L. 809, called the "Banking Act of 1923", and the Act of May 15, 1933, P. L. 565, called "The Department of Banking Code". The relevant sections of these Acts are set forth in the Appendix of this Brief, beginning at page 74.

The other Pennsylvania statute involved is Article 2 of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, quoted on page 61 of this brief.

The Section of the Constitution of the United States involved is the Eleventh Amendment, reading as follows:

> "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of subjects of any foreign state."

STATEMENT OF FACTS.

On February 14, 1933, the Secretary of Banking for the Commonwealth of Pennsylvania, took possession of the insolvent Chester County Trust Company in accordance with the provisions of the Banking Act of 1923 and shortly thereafter determined to liquidate the assets of the Company.

This insolvent institution had been trustee for two mortgage pools, against which participation certificates were issued to persons residing in various States.

Under the Banking Act of 1923 as well as under the subsequent Department of Banking Code of 1933, the Secretary was empowered to liquidate the general assets of the bank for the benefit of depositors and creditors. Under the Act of 1933, he was called a Receiver.

Neither under the Act of 1923 nor the Act of 1933 was the Secretary under the statutes given the right to liquidate the Mortgage Trust Pools but on the contrary he was directed to divest himself of them.

Under the Act of 1923 the Secretary of Banking, after he determined to liquidate a bank was directed to immediately give notice to the beneficiaries of such Pools to have a substituted fiduciary appointed for such Pools, and in the event of their failure so to do, it became his duty immediately to have substituted fiduciaries appointed so that he would promptly be divested of the Mortgage Pools.

Under both the Act of 1923 and the subsequent Act of 1933 any beneficiary could go into court and ask for the appointment of a substituted fiduciary at any time after the Secretary determined to liquidate the institution, or, if the beneficiaries agreed on a substituted trustee, it was not necessary for them to go into Court but the Secretary was directed to turn the Pools over to such substitute, regardless of whether the Secretary of Banking has or has not filed an account of such Pool.

On August 25, 1933 Bills in Equity were filed in the

District Court of the United States for the Eastern District of Pennsylvania praying for the appointment of Receivers for the two mortgage trust pools; one (#549) in behalf of Laura Washington, a citizen of Connecticut; the other (#550) for Mary A. O'Brien, a citizen of New Jersey.

Pending hearing on the Bill and Answer, a motion for the appointment of temporary receivers was made, and the Court fixed August 30, 1933, for a hearing on said motion.

Copies of the Bills in Equity, together with notice of the motion for the appointment of receivers and notice of the hearing was served by the United States Marshal on the Petitioners, (defendants in the suit). However, on the day fixed for hearing, the defendants failed to appear, and at the instance of the Court the attorney representing the Banking Department was telephoned by the Clerk to appear at a later hour in the day and at such time the attorney for the Banking Department appeared and vigorously opposed the appointment of Receivers.

The Court, after argument, appointed Receivers but inadvertently omitted the word "temporary" which error was corrected by an Order filed September 22, 1933 (R. 36).

No answer was ever filed by the Department of Banking, though suggested to do so by the Court (R. 42).

The Receivers duly qualified; entered bond, and made demand for the surrender of the Mortgage Pools upon the Deputy Secretary in possession of the bank upon whom the Decree of the Court was served, but surrender of the Pools was refused.

Thereafter, on Labor Day of 1933, an injunction issued from the Common Pleas Court of Chester County (R. 58), without notice to the Federal Receivers or their counsel restraining the Secretary of Banking from turning over any of the assets of the bank to the Federal Receivers. On September 25, 1933, the Court heard argument on a Petition to vacate the Order appointing Receivers and contin-

ued the hearing to the next day to give any party in interest the opportunity to come in and be heard (R. 36). No one appeared other than the Deputy Attorney General, the Receivers and their counsel.

The Petitions to vacate were dismissed by the District Court and an Appeal to the Circuit Court was taken by Petitioners.

On January 4, 1934, argument was heard by the Circuit Court. At the time of the argument, a Petition to intervene was filed in behalf of certain holders of participation certificates. No copy of the Petition was served on Receivers or their counsel and no permission to file a Petition to intervene was given by the Circuit Court of Appeals, nor did it ever form a part of the record in this case by Order of the Circuit Court of Appeals or any other Court, although it is made a part of the record filed by the petitioners.

The basis of the Petition (R. 68) was substantially that they preferred Receivers to be appointed for the Pools by the Chester County Court rather than the Federal Court.

The Circuit Court of Appeals sustained the appointment of the Receivers.

CORRECTED STATEMENT OF QUESTIONS INVOLVED.

1. Where, under a state statute, a substituted fiduciary of a mortgage pool to take the place of a closed banking institution must be appointed, after the Secretary of Banking, has determined to liquidate the Bank, can a beneficiary of the pool, who is a non-resident of the state, proceed for such appointment in the Federal Court?

2. Assuming a beneficiary has that right, can a state statute limit him to proceeding only in the State Court?

3. Assuming a state statute cannot deprive him of the right to proceed in a Federal Court, did the Federal Court

abuse its discretion in appointing Receivers, there being no provision in the statute for liquidation of a mortgage pool, and the Secretary of Banking being specifically enjoined from liquidating the mortgage pool, but directed to divest himself of it?

ARGUMENT.

SUMMARY OF THE ARGUMENT.

The Pennsylvania banking acts, the Act of June 15, 1923, P. L. 809 and the Act of May 15, 1933, P. L. 565 permit the Secretary of Banking to take possession of insolvent institutions. Thereafter a certificate of possession is filed in Harrisburg. A duplicate of such certificate is also filed in the office of the Prothonotary of the County where the institution is located as well as in every county where real estate is situate, the title to which is in the insolvent institution. These certificates are indexed in the Judgment Index Books.

In the instant case, the Act of 1923 was in effect when the Secretary of Banking took possession of the Chester County Trust Co. In July of 1933, the new Banking Code of 1933 became effective.

Under both acts, however, the Secretary of Banking is given the complete authority of a statutory receiver empowered to liquidate the general assets of a banking institution. *This authority is not extended to Mortgage Trust Pools,* such as is involved in this argument. The acts provide that the assets of a mortgage trust pool are to be kept apart from the general assets of the bank. The liquidating process which the Secretary applies to the general assets are not to be introduced to the assets of the mortgage trust pool. True it is that such segregated assets are in the custody of the Secretary once he has taken possession of an insolvent bank, but since the banking officials have been ousted, and mortgage trust pools exist under the roofs of such institutions, it follows naturally that the Sec-

retary must be charged with their safekeeping pending their final administration. Now, if it was the intention of the Legislature of Pennsylvania, as appellants contend, to give the Secretary of Banking control and jurisdiction over such assets, it would have been a simple matter to have stated so. But it did not. On the contrary, the Act specifies the manner in which the Secretary of Banking is to *divest* himself of this fund. And here there is no ambiguity. If, under the clear statement of the acts, after the Secretary of Banking has taken possession of an institution which operated a mortgage trust pool, all the participants in the pool came to the Secretary and asked him to turn the assets over to one of them, he would have no alternative but to do so. The Act further authorizes the holder of a participation certificate to apply for the appointment of a substituted fiduciary *at any time*, to take the place of the defunct corporation. (It is important to notice that the substituted fiduciary takes the place of the corporation and not the Secretary). Briefly, the Secretary is not to liquidate the mortgage trust pool under the statute nor could he possibly be selected as a substituted fiduciary to do so.

Perhaps this argument would never have arisen if the Commonwealth of Pennsylvania had passed two separate acts instead of a single act with separate divisions; one governing the administrations of the general assets of the bank, the other, mortgage trust pools. These acts are detailed at great length in this Brief to show the evident and specific manner in which the Legislature expressed its intention. The argument should be submitted in all fairness, as if the only statutes involved were those sections of the Act of 1923 entitled "Trust Funds" and "Mortgage Trust Pools" under the Act of 1933. The appointment of Federal receivers, it is conceded by appellants, in no way interferes with the Secretary of Banking as liquidator of the Banking business. It is submitted that such re-

ceivers cannot possibly be construed as interfering with the Secretary of Banking as custodian of the mortgage trust pool, for the order of the Federal Court merely carries out the dictates of the state statutes. Appellants, however, argue that under the state statutes relief as sought in the instant case, must be requested in the state court. We submit that the rights of a non-resident to equitable relief in a Federal Court cannot be abrogated by a state statute.

The final test of this argument may be found if this court should reverse the decisions below. The assets comprising the mortgage trust pool would not be relinquished to the Secretary of Banking for purposes of liquidation, but to the substituted fiduciary or receivers appointed by the Chester County Common Pleas Court, who would be appointed upon the prayer of the Bill filed after the bill was filed in the Federal Court. The Supreme Court would thus place a stamp of approval upon an obvious race for jurisdiction. As Judge Welsh said in the Opinion in the District Court (R. 46):

> "It is somewhat difficult to understand the position of the Banking Department of the State of Pennsylvania in this case. What interest and standing has that department? Their position is one of bare, temporary custody, with the duty and responsibility thrown upon them to divest themselves of even that status at the earliest possible moment."

The state statutes further provide that the only forum available for participants in mortgage trust pools shall be the state court wherein the Secretary of Banking shall have filed his duplicate certificate of possession. Unquestionably the Commonwealth may limit the permissive forum within its own boundaries and for its own citizens as it sees fit, but it does not follow that the act intended (even if it could have such effect) to deprive citizens of other

states of existing remedies in Federal courts. For the purpose of this summary argument, it is merely stated that the Pennsylvania legislation did not contemplate such restriction and if it did it would be ineffective.

Nor is the Common Pleas Court of the State of Pennsylvania exercising jurisdiction over this Pool and for the following reasons: The only connection that the State Court has with the Mortgage Trust Pool is by mere co-incidence from the fact that the Mortgage Trust Pool is in the vault of the Chester County Trust Company, the assets of which presumably are presently being administered by the Secretary of Banking. The Secretary of Banking contends that the filing of a duplicate certificate to the effect that he has taken charge of the assets of the closed bank is sufficient to confer jurisdiction upon the Common Pleas Court, but this as is pointed out by Judge Davis in his opinion in the Circuit Court is an administrative detail analogous to recording a judgment in the Index books of the Prothonotary's office. The statutes clearly show that if all the beneficiaries would agree upon the choice of a substituted fiduciary that the Secretary would be authorized to turn over the assets of the Mortgage Trust Pool to such an appointee without the consent of any State Court. How can this be reconciled with the contention that the State Court first acquired jurisdiction of the Mortgage Trust Pool?

Since the State of Pennsylvania has no proprietary interest in this fund and since the Court of Common Pleas could not have jurisdiction either through the filing of the certificate of possession or from the statutory interpretation as we have just given it, it follows that if the Federal Court had jurisdiction, that it first exercised such jurisdiction. The tremendous weight of authority is to the effect that where two Courts have concurrent jurisdiction, the Court which first exercises its jurisdction, retains it exclusively. The first actual exercise of jurisdiction was by the

Federal Court. It may further be said that there is substantial authority that where the subject matter of litigation is different in the two courts, that the Court which first obtains actual possession of the res has exclusive jurisdiction. The State official in the meanwhile has retained possession of the fund awaiting the decision of the Court.

The Commonwealth of Pennsylvania like any other sovereignty has appointed many agents to properly execute the incidents of a sound government. One such agent is the Secretary of Banking. The source of his appointment is found in Article 2 of the Administrative Code of 1929. The act provides for the various executive and administrative functions of government. Under this code the office of Secretary of Banking is created as an administrative officer. The action in the instant case naming the Secretary of Banking and his deputies in possession of the Chester County Trust Company as defendants was not in violation of the 11th amendment but strictly in conformity therewith. This was not a suit in equity against the State of Pennsylvania. The Commonwealth is not the real party behind the action; nor does it possess any proprietary interest in the fund. The Federal receivers taking possession from the Secretary of Banking in no way violates any State interest. The secretary is named party defendant, as temporary custodian of a fund he must give up at the earliest moment. Nor is this statutory receiver an executive officer of the government, so that the suit may not be said to be one which interferes with the mechanism of government. Such transient possession as is vested in the secretary under the banking acts in no way can be said to create any bar to action as is contemplated by the constitution. The state is not being asked to perform an act or relinquish a right. The appointed receivers are to take the place of the defunct corporation and not the secretary of banking. This fund must be given up by the Secretary of Banking and the sole question is: must complainant seek

that relief in the Common Pleas Court of Chester County because the State act so provides for its own citizens?

For the obvious reason that the Secretary of Banking in possession of the defunct bank was custodian of the mortgage trust pool, he became a necessary party defendant to the action in the district court. Where a state official, defendant to an action, stands in the place of his government, then it may be true that as such a substituted person he does not have citizenship for the purpose of the diversity clause.

Appellants have cited a number of cases for the proposition that the Federal courts were without jurisdiction inasmuch as the statutory official is not a citizen within the meaning of Section 24 of the Judicial Code. None of the cited cases (and they are indeed few in number) are applicable to the instant case, for all were decided on the grounds that the actual party in interest was a state or the United States.

Under these circumstances should not the Federal Court have exercised jurisdiction? What was the precise picture presented to the Federal Court and what the necessity for appointing receivers? A State official liquidating a defunct bank was in custody of a Mortgage Trust Pool which was wrongfully in his possession at the time of the filing of the bill for he had violated the statute in failing to divest himself of this fund as he was directed to do. No state court was exercising jurisdiction over the mortgage trust pool. An unsettled real estate market required the most careful and diligent supervision of properties; particularly for the purpose of compelling the payment of interest and taxes, or where interest was in default, the operation of the real estate securing the mortgages as a mortgagee in possession, entitled under the laws of Pennsylvania to the profits and issues of the mortgaged estate. Participants in pool were worried over their investments which in many cases represented a lifetime saving. No account-

ing of their investments were forthcoming. This substantially was averred in the bill.

Judge Welsh in appointing receivers said (R. 49):

> "This Court having affirmed the jurisdiction of the Federal Court in the instant case a word as to the motives which move it as a Chancellor to act would seem to be in order. It must be remembered that the Banking Department took charge of the defunct institution on February 14, 1933. Notwithstanding the fact that millions of dollars are concerned, and a large number of certificate holders are involved nothing has been done by the Banking Department to provide the means for an active, intelligent, responsible administration of its pools. Just why such a situation has continued to exist has not been explained. Non-resident petitioners in this case are dissatisfied with such inaction. In the exercise of their constitutional rights they have appealed to the equity side of this court for relief. They are alarmed over the safety of their holdings. No excuse, no explanation, and no promises of a future policy have been given . . . This Court, therefore, feels that it not only has jurisdiction, but that in view of the status of the case its duty as a Chancellor is that that jurisdiction be recognized and that the prayed for relief be granted."

We submit this to be a fair, logical and equitable conclusion. Refusal to appoint receivers after such an inevitable finding would have been an abuse of discretion.

A. THE FEDERAL COURT HAD JURISDICTION TO APPOINT RECEIVERS AND ITS ACTION WAS A PROPER EXERCISE OF THIS POWER.

I. The Secretary of Banking, Under the Pennsylvania Statutes, Has But a Temporary Custody of a Mortgage Trust Pool, and Cannot Liquidate Such Assets.

The Banking Acts of Pennsylvania segregate mortgage trust pools from the general assets of a bank. As to the general assets, a complete system of liquidation through the Secretary of Banking is provided for. Such supervision is not extended to a fund, such as is here involved.

It has been urged that the appointment of Federal Receivers is an interference with the Secretary of Banking in his liquidation of the insolvent Chester County Trust Co. This contention is untenable because the Federal Receivers are only authorized to take over the Mortgage Trust Pool, and as to this pool, the Secretary of Banking is not acting as a statutory liquidator, nor under the statutes could he possibly be. Under these acts, the Secretary of Banking, can, at the most receive a naked temporary custody of the mortgage trust pool.

The Act of Pennsylvania of June 15, 1923, P. L. 809, known as the Banking Act of 1923 was in force when the Secretary of Banking took possession of the Chester County Trust Co. on February 14, 1923. This act provides in Section 40 (quoted in full at p. 74 appendix) specifically for mortgage pools, as contrasted with the general assets of the bank. Substantially, it is provided that:

(1) Trust Funds (mortgage pools) form no part of the general assets of a bank and are to be kept separate and apart from the other assets of the bank, by the Secretary of Banking, who is given temporary custody.

(2) The Secretary of Banking is not to administer the fund, but as soon as he has determined to liquidate the

assets of the bank he is required, *forthwith* to give notice to all the beneficiaries, for them to apply within 30 days for the appointment of a substituted Fiduciary to take the place of *such corporation,* (the insolvent bank). It is noteworthy that the statute does not say that the substituted fiduciary is to take the place of the Secretary of Banking, but rather in place of the corporation. What other interest in the Secretary could this signify, but a mere custody?

(3) Upon the failure of any beneficiary to apply for a substituted fiduciary within 30 days after receipt of such notice from the Secretary of Banking, then the Secretary shall himself apply for the appointment of a substituted fiduciary. So that in no event is the Secretary to administer and liquidate this fund.

(4) Finally, if all beneficiaries consent, the assets may be turned over to a substituted fiduciary selected by them without any accounting or court action.

It is clear, therefore, that under this statute, the Secretary of Banking had no right to liquidate this fund, as other assets of the Bank, but had to divest himself of it.

It is further evident that until such an appointment is made, or *at least until application for such appointment is made,* that this fund is not within the jurisdiction of any court for the specific reason that until such an appointment or application is made there is not the slightest vestige of control exhibited by any state court.

Notwithstanding the specific provisions and directions of the Act of 1923, the Secretary of Banking failed in his duty, and up to the time of the filing of the Bill, six months later,—no action was taken—nor notice issued by him, nor has he done anything up to the present to divest himself of the pool.

On July 3, 1933, a new Banking Code became effective. Under this Act a further separation of the assets of the mortgage pool from the general assets of the Bank was spe-

cifically provided for. The earlier act captioned mortgage pools under the general heading and treatment of "Trust Funds". But the Pennsylvania Act of May 15, 1933, P. L. 565 leaves room for no doubt by heading the subject "Mortgage or Security Pools". The pertinent sections 901, 902, 903 and 904 A are quoted in full in the appendix to this brief at p. 77.

Substantially the Acts are alike so far as they pertain to the question in the instant case. If anything, the Secretary's passive custody of the fund and the State Court's indifference to the mortgage trust pool as distinguished from the general assets of the Bank or Trust Company is emphasized. Section 902 permits the beneficiaries when they unanimously agree upon the substituted fiduciary to direct the Secretary of Banking to turn over to such person the assets constituting the mortgage pool. (This extends Section 40 of the Act of 1923). *The consent of the state court is not necessary.* Is it conceivable that if the Secretary of Banking was to liquidate this fund exclusively in the same manner as the other assets of the bank that the statute would provide a method by which beneficiaries could interfere with such liquidation? No such provision is made for any of the other assets of the bank. The logical conclusion, therefore, must follow: that the Secretary's possession is a mere temporary custody. And is it conceivable that if the State Court was exercising jurisdiction over the fund, that the statute would provide a means of wresting the res away from the court without at least having the State court consent or abandon its jurisdiction? The logical conclusion again follows: the State court was not exercising jurisdiction over the mortgage trust pool.

Section 904 provides, inter alia:

1. That after the Secretary of Banking shall have filed a supplemental certificate setting forth his intention to liquidate the institution, and either before or after he

has filed his account, any beneficiary may apply for the appointment of a substituted fiduciary.

2. If no such petition be filed within thirty days after the beneficiaries receive notice of the Secretary's intention to file an account, then the Secretary is directed to apply for such appointment in the court in which he has filed his certificate of possession.

Until the complainant filed her bill in the District Court for the appointment of Receivers, no application had been made in the state court for the appointment of a substituted fiduciary, either by a beneficiary in the exercise of his equitable right as well as that granted him under the State statute, nor by the Secretary of Banking in accordance with its mandates. The only justification offered by the Secretary for his failure to act is that Section 901 provides for the filing of an account "at his convenience". It is submitted that the long delay of the secretary cannot be justified by this clause which at the most should mean a reasonable time. Further, this completely overlooks the fact that the Banking Act of 1923 was in force when the Secretary of Banking took possession, which directed him to give notice "forthwith" to beneficiaries to request a substituted fiduciary for the institution.

It is respectfully submitted that the powers of the Secretary of Banking under the State statutes, with regard to mortgage trust pools, is a limited authority indeed. That he was not in the process of liquidating these assets in a manner attributable to conventional receiverships; nor could he so act. That the act confers upon this official a mere temporary custody of the fund due to his possession of the general assets of the Bank which he is properly liquidating. If this be so, then the appointment of Federal receivers, in no way conflicts or interferes with the Secretary of Banking in the performance of his duty to liquidate the general assets of the bank.

The practicalities support this contention. Immedi-

ately after complainant filed her Bill, application was made in the local court for the appointment of a substituted fiduciary. (Although this forms no part of the record here.) The Banking Department must concede that if the appointment of Federal Receivers is not upheld, that the Mortgage Pool must be surrendered to a fiduciary or Receiver of the County Court. Accordingly, if an unfortunate atmosphere of "race for jurisdiction" has been cast over this case, it cannot, therefore, be attributed to complainant.

The complainant then, is in no way attempting to interfere with the Secretary of Banking in the exercise of his duty as statutory receiver, liquidating the assets of the Chester County Trust Company. Interference if any, is with the Secretary as passive custodian of the mortgage trust pool, *the assets of which have been earmarked for supervision by the beneficiaries.* It follows that many of the cited cases as BANK OF BAY BISCAYNE VS. HANKINS, 42 Fed. (2nd) 209 (C. C. A., 5th Circuit) has no application to the facts in the instant case. In the cited case, Comptroller of the State had closed the bank and was liquidating its assets in accordance with the state statute, when the receiver was appointed by the Federal Court at the instance of a depositor. The receivership proceedings concerned the general assets of the bank and not a special fund for which a statute provided a separate system of liquidating. The Court said:

> "Whenever the laws of a state provide for supervision and control of the affairs of a bank by an authorized official, and also for the *ultimate liquidation* and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to interfere, and that should be done only in a perfectly clear case."

Our stand in the instant case in no way conflicts with this

theory. *Pennsylvania has not provided for the liquidation of the mortgage trust pool through an authorized official.* On the contrary, liquidation cannot take place through the official supervising general banking assets for he is directed to divest himself of this fund and permit liquidation through the beneficiaries. Similarly, and for the reason that the Secretary is not the statutory official selected by the State to liquidate the assets of the mortgage trust pool, the following cases have no application:

AMOS v. TRUST CO. OF FLORIDA, 54 F (2nd) 286 (1931) C. C. A. Fifth Circuit.

In this case, pending the hearing in the Federal Court for the appointment of receivers for the trust company, the Comptroller of Florida took possession of the institution as he was authorized to do under the state statute and then intervened in the Federal proceedings. The ousting of the state comptroller was denied on the primary ground that the statute under which he acts gave him powers to administer and liquidate the fund, and that since a state statute had provided a method of liquidation by its own officials, such administration should not be interfered with. The court said:

> "The comptroller and his liquidators are competent to execute trusts like those here involved; they being within the powers of the corporation to be liquidated . . . A proper respect and deference on the part of the federal agencies of government towards those of the state, compels that assumption."

If a Federal receiver was sought for the general assets of the Chester County Trust Co. then the AMOS v. TRUST CO. decision, *supra*, might apply, for under the Banking Act of 1933 the Secretary was liquidating such assets and has competent facilities to continue to do so. *But the case can have no application to the one at bar, for the specific reason that the Secretary is merely the custo-*

dian of the mortgage trust pool and not the fiduciary to liquidate it, nor could he be.

MITCHELL v. LAY, 48 F (2d) 79 (C. C. A. 9th Circuit) 1930 (appellant's brief, p. 19 and p. 26).

In this case applicant in the Federal Court for the appointment of receivers for an insurance company was the holder of an award under the Workmen's Compensation Law of California. The license of the insurance company had been revoked by the Insurance Commissioner, who, acting under the state statute had applied to the Superior Court about a month after federal proceedings were instituted to liquidate the affairs of the association and praying the court to appoint him receiver. The action of the district court appointing receivers was reversed on the ground that the Industrial Accident Commission had set aside the award made plaintiff so that the plaintiff was "merely the holder of an unliquidated claim being prosecuted in state tribunal".

The court said:

> "Whether, upon the ground of diversity of citizenship and in default of any judicial proceeding in the state courts, a federal court of equity might enforce the rights of a non-resident to such a fund or take jurisdiction thereof, is a question not involved in this case."

The decision in the cited case is utterly irrelevant to this argument.

JACOBY VS. BOND AND MORTGAGE GUARANTY COMPANY, 72 F (2nd) 420 (CCA 2nd Circuit) 1934 and (Appellant's Brief, p. 25). Here the Superintendent of Insurance by order of the court had been in possession of a defunct trust company since August 3, 1933, and under a New York

statute was liquidating the assets of the company. In December 1933, complainants filed a bill for the appointment of trustees for the corporation and prayed that the act under which the Superintendent of Insurance had taken possession be declared unconstitutional. The Circuit Court held the act constitutional, but decided the case on prior acquisition of jurisdiction by the State court. On page 424 the Court said:

> "In either event the superintendent has taken over a business under an order of the state court and is exercising functions which he is authorized to exercise in such cases by the New York law. This fact, irrespective of the wisdom, or even the validity of his acts, makes it necessary for dissentient certificate holders to seek relief in the state court which had assumed prior jurisdiction."

It might well be indicated that the state court assumed prior jurisdiction in this case by issuing a rule to show cause why the company should not be taken over by the Insurance Commissioner.

So that the Jacoby case merely illustrates the well established principle that exclusive jurisdiction is vested in the court having a concurrent jurisdiction and first exercising its power.

Two recent decisions of the Supreme Court of the United States, by Stone, J., clearly show the distinction between the case at bar and the cases of AMOS v. TRUST Co. and MITCHEL v. LAY, *supra*.

In COMMONWEALTH OF PENNSYLVANIA, PETITIONER, v. JOHN G. WILLIAMS, ET AL, No. 394—October Term, 1934, the Federal court had appointed receivers for a Pennsylvania building and loan association upon the application of a non-resident, on February 3, 1933. On hearing, the Secretary of Banking had informally requested the district judge not

to make the appointment of receivers permanent and to allow the property of the defendant to be surrendered to the Secretary, to be liquidated and administered in accordance with the state statutes. On February 17, 1933, the Secretary "took possession" of the property and appointed special deputies to assist in liquidating the defendant's business. The opinion of the Supreme Court, by Stone, J., held that while the Federal court has jurisdiction to appoint receivers, it should not have exercised this power because the Secretary had been clothed with a complete authority and system of liquidation under the State act. The court said:

> "Here no state court is asserting jurisdiction, but *the state officer, charged by the statutes of the state with the duty of supervising his own building and loan associations and of liquidating them by an adequate procedure* when insolvent, *asks to proceed with the liquidation.* See AMOS v. TRUST CO. OF FLORIDA, 54 F (2nd) 286, 288 (C. C. A. 5th) (Italics ours) . . .
>
> Here, upon presentation of the application for appointment of receivers, which would involve such an interference, the district judge might appropriately have required notice of the application to be given to the state officers. It was his duty to do so, if satisfied that the delay involved in adopting that course would not result in the sacrifice of any vital interest of the insolvent corporation, its creditors or its stockholders. On the showing *that their interests would be adequately protected by liquidation under the direction of the Secretary of Banking; the district judge should have denied the application* for the *appointment of receivers,* or, if he had already appointed them, should have discharged the receivers, and directed the surrender of the property in their possession to the Secretary *in order that the liquidation might proceed under the state statutes.*" (Italics ours.)

In GORDON v. OMINSKY, No. 395—October Term, 1934, argued at the same time as COMMONWEALTH v. WILLIAMS, supra, the opinion of the court also by Stone, J., upon a similar set of facts concludes for the reasons as above that the Federal court should not have exercised jurisdiction.

The opinion concludes as follows:

> "In any event, *the allegations of the answer, that 'the possession and control of the assets of the defendant by the Secretary of Banking, pursuant to statute, will result in the preservation of the assets of the defendant and the proper distribution of funds realized from their liquidation, are not challenged.*" (Italics ours.)

No answer was filed by the Secretary of Banking to the allegations in complainant's bill. It is a certainty that such an answer could not set forth that the Department of Banking is clothed with complete authority under the statute to liquidate the assets of the mortgage trust pool. On the contrary, it would necessarily set forth the Secretary's direction to divest himself of this fund to a substitute selected by the beneficiaries or the Court. It is submitted that had such an answer been filed, it would be apparent that neither the State of Pennsylvania nor any of its agents had any interest in this fund so that many of the questions here framed, would be more readily disposed of.

The interested parties in setting in motion the liquidation of mortgage trust pools are, the beneficiaries of the fund. The Attorney General in his annotations to the Act of 1933 had this to say:

> "The owner of an undecided interest in any mortgage or securities pool or in a special mortgage securities pool probably has the right to ask for a substituted fiduciary at any time."

The Department of Banking has no position in liquidation of a mortgage pool, and if no beneficiary seeks the appointment of a fiduciary for that purpose then the Secretary is ordered to file an application for such a fiduciary.

Appellants have contended that the Federal court should not exercise jurisdiction where a state by statute has provided a complete system for the liquidation of insolvent institutions through a statutory official. This principle has no application to the instant case for the statutes of Pennsylvania have not provided such a system, nor clearly was such a system contemplated for mortgage trust pools. This is shown by the manner of setting up an independent method of liquidating such pools as distinguished from general banking assets. Our analysis of appellant's cases we submit, show them, for these reasons, to be inapplicable.

II. The Mortgage Trust Pool Was Not Within the Jurisdiction of the County Court When Federal Receivers Were Appointed.

The Department of Banking Code of 1933, provides in Section 604 (Quoted in full on page 76 appendix) that after the Secretary of Banking takes possession of an insolvent institution, he shall prepare in duplicate a certificate, the original of which shall be filed in his office in Harrisburg and the copy in the prothonotary's office. The Act of 1923 by Section 22, quoted in full at p. 74 in the appendix to this brief, was substantially the same. Then, certified copies shall be filed with the recorder of deeds in every county where the institution possessed real estate.

If at the time such certificate is filed, the Secretary of Banking has not named a deputy to act for him, a supplemental certificate to that effect is to be filed in exactly the same manner as the original certificate, when the deputy finally is named.

The Act further defines the status of the Secretary of Banking after he has complied with the above provisions.

Section 701. Status of Secretary as Receiver.—

"Except as otherwise provided in this act, the Secretary when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court. His rights, powers, and duties shall be those of a general receiver appointed by a court in equity in this Commonwealth, except as such rights, powers and duties are increased or limited by this act."

Upon the application of a depositor or creditor of a banking institution for the appointment of a receiver, only the Secretary can be appointed.

Section 606. "Power of Courts to Appoint Receivers. No court shall appoint anyone but the Secretary as receiver of an institution. Whenever any court, at the instance of a depositor, shareholder, or other person entitled by law to institute such proceedings, shall determine that a receiver should be appointed, for any reason whatsoever, it shall appoint the Secretary as such receiver.

When thus appointed receiver by a court, the Secretary shall serve in the same manner and with the same limitations and he shall have the same rights, powers, and duties, as when he becomes receiver by operation of law and without appointment by any court. *No court shall impose upon the Secretary as receiver any duties or restrictions which are in conflict with the provisons of this act.*"

We are at this point concerned with the legal standing of the Secretary as a "Receiver" and since the sections

of the act governing Mortgage Trust Pools naturally contain nothing about the Secretary as a "Receiver", for that is not contemplated, reference must be made to those sections which do define his power as a Receiver but limit his liquidation to general banking assets only.

The appellant contends that when the Secretary files his duplicate certificate of possession with the prothonotary, the State Court immediately acquires jurisdiction and moreover, that the statute subjects him to the jurisdiction of a particular state court.

In the opinion of the Circuit Court of Appeals (R. 89) Davis, J., denied this contention in the following manner:

"It" (the statute) "subjects" him to the jurisdiction of a particular court, only in the sense that it points out the State court which shall have jurisdiction over him when it is invoked.

Judge Kirkpatrick in commenting on this section of the statute in the case of GENERAL BANKING COMPANY VS. WILLIAM G. GORDON AND JOHN J. SULLIVAN (decided October 11, 1932) said:

> "'As to the jurisdictional question raised, I am satisfied that this court has jurisdiction. The Secretary of Banking is an administrative officer. His office exists by statute. He is appointed by the governor and not by the court. He is not an equity receiver, and the mere fact that the statute provides that he shall have the rights, powers and duties of an equity receiver does not make him one, nor does the fact that the Common Pleas Courts of the state are given jurisdiction to make certain orders and decrees relating to the conduct of the liquidation and the rights in the funds does not mean that the fund is in the custody of the court. That depends entirely upon the nature of

the liquidating officer and the power from which he derives his authority.' ".

As to the effect of filing the certificate of possession, the Circuit Court had this to say (R. 90):

"The indexing of a certified copy of the certificate of possession, when filed in the office of the prothonotary by the Secretary, as plaintiff, in the 'judgment index' does not confer upon the court jurisdiction which has not been invoked. The mere filing of a paper which in fact is nothing more than a notice that possession of the property has been taken, cannot confer jurisdiction upon the court in the absence of any law to the effect that such an act constitutes the beginning of legal action rather than the notice of a mere act of a state officer in the performance of his administrative duties. The Secretary, just as any other citizen, may invoke the jurisdiction of the court, but the simple filing of a mere notice of an administrative act does not do so and this seems evident from the terms of the Act. This paper is more particularly a notice to the county in which the corporation is located as distinguished from a notice to the Commonwealth generally when filed in Harrisburg. As Judge Kirkpatrick observed with regard to an "equity receiver" the fact that he is called "plaintiff" in this simple notice does not make him one in a legal action which the paper itself does not in terms, nor by necessary or reasonable implication, purport to institute. It is not analogous to the filing of a bill for a receiver, as stated by counsel, which contains definite allegations invoking the court's jurisdiction and praying for certain definite action of the court. The certificate does nothing of the kind. It is only a notice setting forth that the Secretary has taken possession of the business and property of the corporation, does not in-

voke the jurisdiction of the court and asks nothing of it. It is rather analogous to the recording of a deed, mortgage or notice of lien."

Judge Davis' theory that filing of the certificate of possession is no more than public notice is amply borne out by the indifference with which the statute treats this procedure. This is covered by Section 604 already referred to (quoted in full on p. 76 of the appendix). Firstly, the original certificate of possession is not filed in court—that is reserved for the main office in Harrisburg. Only a duplicate is filed. Then, so as to notify all owners or otherwise interested parties, a similar certificate is filed in every county where real estate is located in which the institution is interested. Lastly, at the time the Secretary names a deputy, if he has not already done so, he files supplemental certificates identical with the first filed. We submit that this is not the institution of judicial proceedings.

The case of FARREL V. STODDARD, SUPERINTENDENT OF INSURANCE OF NEW YORK, ET AL 1 Fed. (2nd) 802 (C. C. A. 2nd Circuit) 1924, presented a situation almost identical with the instant case. There a non-resident of New York sought to impress a trust upon certain assets of an institution which had been taken over by the Superintendent of Insurance of the State of New York in accordance with this statute. The Insurance Commissioner had applied to the Supreme Court of the State of New York, as he was required by the statute to do, on February 6, 1923, for an order permitting him to act under the statute and take possession of the property and conduct the business of the Niagara Company. About February 15, 1923, the State court made such an order. On February 27, 1923, the plaintiff filed his bill in equity. The superintendent of insurance filed a motion asking the Federal Court to decline ju-

risdiction on the grounds of comity. The plaintiff contended that the fund was not in the custody of the State court or its agent, but rather in the custody of the defendant as a public officer. The motion to decline jurisdiction was denied. The court said:

> "An examination of Section 63 of the Insurance Law of the state of New York makes it clear that the superintendent of insurance is a public officer in the executive department of the state government, and that he still retains his character as a public officer when he acts as liquidator of insurance companies under the provisions of this statute. His power to act as custodian of the res comes alone from the statute. The judicial power cannot change or modify this statute, or affect his power in any respect whatever. True, the defendant must first apply to the court for an order to act as liquidator. That, however, merely means that the court must give the signal to start the machinery under which the superintendent, the agent of the executive power, acts. Thereafter, the defendant, as the representative of the executive power, pays no heed to the court or its mandates. His chart is the statute under which he acts."

Notwithstanding the order of the State Court in the quoted case, the Federal Court decided that it should retain jurisdiction. The case at bar does not even present that problem for in no conceivable manner can any *judicial action* be found. The only analogy is the filing of the certificate of possession which is not in the nature of an application to a court.

It is respectfully suggested that a fair and logical test to determine whether or not a court has exercised jurisdiction when the question centers about the actual dominion

of the Court is found in the case of WARD v. FOULKROD, 264 Fed. 627 (C. C. A., 3rd Circuit) 1920, Judge Woolley said:

> "Control over the property in controversy, it is conceded, is the test of jurisdiction in a conflict between courts of concurrent jurisdiction. When the question which court has control over the property—is determined, it is equally well settled that the court which first acquired such control is the one that first acquired jurisdiction and has the right thereafter to proceed with the action to its final determination without interference with the other court. TAYLOR v. TAINTER, 16 Wall 370, 21 L. ed. 287; BELL v. TRUST COMPANY, 1 Biss. 260 Fed. Cas. 1260. . . ."
>
> "Where two courts may each take jurisdiction of a matter, that court in which the first action was brought, *if the action be of a character that makes the court's dominion over the res essential to its judgment*, or if the action be substantially the same as the one later brought in the other court, will acquire jurisdiction of the res on the commencement of the action and retain it to the end although actual seizure thereof was made by the other court in the later action . . ."

Completely apart from the problem of *priority* in acquisition of jurisdiction Judge Woolley uses as a test for exercise of jurisdiction, the element of control. By this, the court clearly explains, is meant some actual act of dominion. In all fairness, it becomes difficult to perceive how any actual act of dominion can be attributed to the local court from the administrative detail of filing a certificate of possession.

In ALLEN v. UNITED STATES, 285 F 678 (C. C. A. 1st Circuit), 1923, it was contended that the Banking Commissioner of Massachusetts acting under a statute almost iden-

tical to that in the instant case, when he had taken possession of an insolvent institution became a receiver of the state court and his possession became the possession of the state court. In denying that the state court had jurisdiction of the res, the court said:

> "The character of the commissioner has recently received consideration by the Supreme Judicial Court of Massachusetts in COMMONWEALTH v. ALLEN, 133 N. E. 625 in which the court, by Rugg, C. J., said:
>
> 'The commissioner is an executive or administrative officer. He exercises visitorial powers, is charged with duties of rigid inspection, and when circumstances exist enumerated in St. 1910, C. 399 Sec. 2 (G. L. c. 167 Sec. 22) may take and retain possession of the property and business of the bank for the purpose of liquidation of its affairs in accordance with the statute. He acts in all these particulars as a public officer, and not as a receiver appointed by the court. While he possesses some powers commonly conferred upon a receiver, and in many respects is subject to the direction of the court, he nevertheless carries out directly and indirectly his own official capacity a legislative policy. His chart is the legislative mandate as declared in the statute.'"

Similarly in IN RE CHETWOOD, 165 U. S. 443, 17 S. Ct. 385, 41 L. Ed. 782, it was held that a receiver appointed by the Comptroller of the Currency, under statutory power, was not an officer or agent of the court, and that his custody was not the custody of the court. Here upon the insolvency of a national bank, a receiver was appointed by the Comptroller of the currency. Thereafter a petition in equity was filed in the state court by Chetwood and prosecuted to judgment. The Federal Receiver sought an injunction in the District Court (amongst other matters) restraining Chetwood from proceeding further. Chetwood

violated this order and was adjudged in contempt. Writ of certiorari was allowed to bring up the record so that the order adjudging Chetwood in contempt be revised and annulled. The receiver contended that the Federal Court had exclusive jurisdiction because after his appointment by the Comptroller he filed an application in the Federal Court for the sale of personal property of the defunct institution.

On page 787, the Court said:

> "The filing of a petition by a national bank receiver in a Federal Court does not operate to make him an officer of that court, *or to place the assets of the bank within the control of the court in the sense in which control is acquired where a receiver is appointed by the court.*"

All of the cited cases and many more similarly decided but not cited for the purpose of avoiding surplusage, hold, that the possession of a statutory receiver is not the possession of the court. Not one case has been found placing a statutory receiver in the position of an ordinary equity receiver for the purpose of conferring jurisdiction upon a court.

It is submitted that IN RE CHETWOOD is in perfect accord with Judge Woolley's test of acquisition of jurisdiction in WARD v. FOULKROD, *supra*.

In the recent case of PENN GENERAL CASUALTY CO. v. PENNSYLVANIA EX REL. SCHNADER, October Term, 1934, No. 431, Justice Stone clearly draws this distinction. In that case a bill for the appointment of receivers was filed in the Federal Court on November 17, 1933. On December 8, 1933, while the federal action was pending the Attorney General of Pennsylvania in pursuance of statute filed a suggestion in the state court that the company was insol-

vent and prayed for a rule to show cause why the Insurance Commissioner should not take possession of the company and for an injunction. The company filed an answer setting forth the pendency of the Federal action. The State Supreme Court affirmed the decree of the lower court that liquidation proceed through the Insurance Commissioner. However, the United States Supreme Court reversed this finding because the state court inadequately treated the question of priority of jurisdiction. The opinion of Stone, Jr., said:

> "Where the assertion of jurisdiction by the two courts is nearly simultaneous, it becomes important, as in the present case, to determine the precise time when the jurisdiction attaches. If the two courts do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property *pendente lite*, the time of acquiring actual possession may perhaps be the decisive factor. Compare MORAN v. STURGES, *supra*, 284; HARKIN v. BRUNDAGE, *supra*, 43. But when the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as in constructive possession and as authorized to proceed with the cause. HARKIN v. BRUNDAGE, *supra* 43-45. *Jurisdiction thus attaches upon the filing of the bill of complaint in court, at least where process subsequently issues in due course.* PALMER v. TEXAS, *supra* 129; FARMER'S LOAN AND TRUST CO. v. LAKE STREET ELEVATED R. CO., *supra* 60; compare SMITH PURIFIER CO. v. MCGROARTY, 136 U. S. 237, 240. The confusion and uncertainty are thus avoided which might otherwise result from the attempt to resolve the troublesome question of what constitutes actual

possession and *to determine priority of service of process in the two suits.*"

The language of Judge Davis in the opinion in the Circuit Court of Appeals clearly distinguishes between the filing of a certificate of possession which merely is a notice of an administrative act, and the filing of a bill of complaint. The former cannot confer jurisdiction because it does not invoke the jurisdiction of a particular court; the latter may—a sound check apparently being whether or not the filing of the bill results in some act of dominion by the court to indicate control over the res, as the appointment of a receiver or issuance of injunction.

So in O'NEIL v. WELCH, 245 Fed. 261 (C. C. A. 3rd Circuit 1917) the state court was found to have prior jurisdiction, not because the Insurance Commissioner had first applied to the state court to take over the assets of a defunct corporation, before the bill was filed in the Federal court for the appointment of a receiver, but because "process issued in due course" out of the state court following the Insurance Commissioner's application.

In this case, under the PENNSYLVANIA ACT 1911 P. L. 599, it was provided that whenever any domestic insurance company is insolvent, the insurance commissioner, may through the attorney general apply for an order directing such corporation to show cause why the insurance commissioner should not take possession of its property, conduct its business and distribute its assets. The insurance commissioner, by the attorney general, filed a suggestion in the state court and obtained a rule directing the insurance company to show cause why *the court* should not take possession of its property and why the court should not order liquidation of its business and dissolution of the Company.

The order read: "Pending the further order of this court, the said Union Casualty Insurance Company of Phil-

adelphia, Pennsylvania, its officers and employees are *hereby enjoined and restrained* from transacting any of the business of said company or disposing of any of the business of said company or disposing of any of its property" (Could there be any doubt that from such an order the court must find an act of dominion indicating control over the res?) Prior to the hearing on the rule to show cause, but after it had been granted, a non-resident stockholder filed a bill in the Federal Court, praying a dissolution of the corporation and distribution of its assets, and a Receiver was appointed by the Federal Court. The petition of the Attorney-general to the District Court seeking revocation of the appointment of Federal receivers was dismissed in the District Court, but reversed in the Circuit Court of Appeal. The Circuit Court in reversing the lower court did so on a single question; which court had first acquired jurisdiction. The Court said:

> "We must, therefore, inquire with some care into the subject matter of the State action before we can determine *when* the State court acquired jurisdiction and whether it was deprived of it by the subsequent action of another court.
>
> Given briefly, the Insurance Commissioner, acting through the Attorney General, files in a State court a suggestion of the corporation's insolvency or unlawful conduct. In this way, the State acts and in this way the State begin suit. Upon the State's suggestion, the Court starts a judicial inquiry by directing to the insurance company a rule to show cause why the insurance commissioner should not take possession of this property, and at the same time the Court, if it wishes, lays its hand upon the company's property and by a restraining order holds it within its control, pending the inquiry."

To what extent a statutory receiver must proceed in

court for the purpose of invoking the jurisdiction of that court is clearly demonstrated by WELCH v. O'NEIL. When contrasted with the mechanical act done in the instant case by the Secretary in filing his certificate, independent of any act of the court, the distinction becomes very clear.

The content of the Banking Code of 1933, moreover, indicates a clear legislative intent that closed institutions (but only so far as the general assets are concerned, that is the assets for the benefit of depositors and creditors only) were to be managed solely by the Secretary or his deputies. It is a paternalistic act by which the state has appointed a representative to guard the bank deposits of its citizens. It is to this agent that the Executive Department of the Commonwealth of Pennsylvania, under the statute, will turn for an accounting and he only is the responsible party. The court or courts where certificates of possession may be filed are completely outside this picture. On the other hand the Legislature has specifically directed the Courts not to impose upon the Secretary any duties inconsistent with the provisions of the act.

We, therefore, contend that the possession of the Secretary of Banking is not the possession of the State court so that the appointment of federal receivers in the instant case can raise no question of conflict of prior jurisdiction by a state court; that the mere fact that the state statute defines the secretary as a "receiver" limits him to the status of a "statutory receiver" as shown by the decisions and that definitely such a receiver is not an arm of a state court; that finally, the effect of filing a duplicate certificate of possession does not bring the res of the mortgage trust pool within the jurisdiction of a state court but amounts only to a public notice that the Department of Banking has taken possession of an insolvent institution.

By Section 606 quoted in full at page 24 of this brief, it is provided that:

"No court shall impose upon the Secretary as receiver any duties or restrictions which are in conflict with the provisions of this act."

It is submitted that such legislation is incompatible with a theory which attempts to make of a statutory officer an equity receiver; inconsistent with a theory which seeks to make the possession of such agent of the State, the possession of the Court in which he has filed his certificate of possession.

III. The Statutory Provisions for the Appointment of a Substitute Fiduciary for Mortgage Trust Pools in the County Court Is Not an Exclusive Remedy Where a Non-Resident Is Concerned.

Appellants contend (P. 16 of their Brief) that the system for the liquidation of banks through an administrative agency of the Government is an exclusive one. *This argument is not applicable to the instant case for we are here concerned with a fund which is definitely not to be liquidated by any administrative agency of the government.* For the purpose of accurately stating the question, however, we submit it as follows: Is the provision in the state statute that applications for the appointment of a substituted fiduciary be presented in the court where the secretary has filed his duplicate certificate of possession, an exclusive remedy?

In support of the exclusiveness of such a state system the case of PORT NEWARK NATIONAL BANK OF NEWARK v. WALDRON, 46 F (2nd) 296, (C. C. A. 3rd Circuit (1930)) is cited. In that case, the Chief National Bank Examiner had been examining the condition of a national bank which was in financial difficulties. On August 7, 1930, he conferred with the officers of the bank upon an offer by another bank to take over the insolvent institution and assume its liabilities. At five o'clock that evening, a stockholder of the

bank presented a bill to the district judge in chambers alleging the insolvency of the bank and praying for a receiver and an injunction. A decree issued accordingly. The next morning the Comptroller of the Currency, learning of this fact appointed a receiver for the bank in accordance with the U. S. statutes. The conflict then, involved no other jurisdiction but that of the Federal Court. The Circuit Court of Appeals decided that the Receiver of the Federal Court be discharged upon the primary ground that the Comptroller had already begun to function under the statute.

The following quotation is from the Waldron case:

> "In the present case we regard the Comptroller at the time this bill was filed as having complete dominion over, and, by his bank examiner, full legal control of, the then and future operations of the bank, and that such situation might ultimately require the appointment of a receiver. Consequently, the court below, when the bill was filed, acquired no jurisdiction to shear the Comptroller of the statutory power to take the further step of appointing a receiver."

That court held that when the bill was presented in the Federal court, the Comptroller was already in possession of the insolvent bank; further, that the real contest was between the judicial and executive branches of the same sovereignty, and, when that sovereignty had given one branch exclusive control the other could not interfere.

The Waldron case, if anything, supports the District Court appointing receivers in the instant case. We have heretofore argued that the Secretary of Banking is a statutory receiver and as such his possession is not the possession of a state court; that the filing of the duplicate certificate of possession is insufficient to bring the res within the jurisdiction. The Federal Court sitting in equity had

jurisdiction because complainant's interest was within the required sum and there was diversity of citizenship. The appointment of receivers was the first exercise of jurisdiction and under the cases confers exclusive jurisdiction upon the Federal court. The subsequent attempt to exercise jurisdiction was by the Common Pleas Court of Chester County as a result of the filing of a petition for the appointment of a substituted fiduciary. Comity required the state court to refrain from acting—that the federal court having exercised jurisdiction, retained it conclusively.

We are here concerned with courts of concurrent jurisdiction. The cases are legion to the effect that when federal courts first exercise jurisdiction they can retain it to the end.

COMMONWEALTH OF PENNSYLVANIA v. PENN GENERAL CASUALTY Co., *supra;*
HARKIN v. BRUNDAGE, 276 U. S. 36, 48 Sup. Ct. 268; 72 L. ed. 457;
PONZI v. FESSENDER, 258 U. S. 254, 66 L. ed. 607, 42 Sup. Ct. Rep. 309;
COVELL v. HEYMAN, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. 355;
FARMERS' LOAN AND TRUST Co. v. LAKE STREET ELEVATED RAILWAY Co., 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564;
RICKEN LAND & CATTLE Co. v. MILLER & LUX, 218 U. S. 258, 54 L. ed. 1032, 31 Sup. Ct. Rep. 11;
WELCH v. O'NEIL, *supra;*
FARREL v. STODDARD, 1 Fed. (2) 802 C. C. A. 2nd Circuit (1924).

The general rule is succinctly stated by the late Mr. Chief Justice Taft in the case of HARKIN v. BRUNDAGE, *supra*:

"The principle which should govern in a conflict of jurisdiction like this has been a number of times

stated by this court. As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute."

The other cases cited by appellants to support the exclusiveness of the state administration system are AMOS v. TRUST CO., *supra*, and BANK OF BAY BISCAYNE v. HANKINS, *supra*. These cases we have already analyzed and submit are not applicable for the reason that in both cases the facts involved interference with a *state official* liquidating the general *assets* of a defunct institution whereas in the instant case the Secretary is not liquidator of the mortgage trust pool, nor could he be, nor had any liquidator of the fund been appointed at the time of the filing of the bill.

What then is the effect of the Pennsylvania statute which limits the forum to the state court? We submit the general rule to be that the right of a non-resident to seek an existing equitable remedy in a Federal court, may not be abrogated by a state statute.

The District Court derives its power from the Constitution and from Congress and not from the Commonwealth. Article 3, section 2, of the Constitution provides that:

"The judicial power shall extend . . . to controversies . . . between citizens of different states."

Congress pursuant to this authority, has provided that District Courts shall have original jurisdiction of all suits of a civil nature at common law or in equity, where the matter in controversy exceeds, exclusive of costs and interest, the sum or value of $3,000.—and is between citizens of

different states, Section 24, Judicial Code (28 U.S.C.A. Sec. 41). This is the source of the jurisdiction and power of the District Court in this case. The federal court will give effect to the laws of a state provided there is no invasion of its own jurisdiction nor impairment of the rights of non-residents.

In O'NEIL *v.* WELCH, *supra*, Judge Woolley said:

> "It cannot be doubted that the Federal Court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no state statute can impair or destroy that power."

This quotation voices the vast authority which has ruled that the jurisdiction conferred upon the Federal courts by the Constitution and Congress, cannot be infringed by state legislation which attempts to confer exclusive jurisdiction of such controversy upon its own courts and administrative bodies, by prescribing exclusive method of commencing or conducting litigation.

KLINE v. BURKE CONSTRUCTION Co., 260 U. S. 226, 43 Sup. Ct. 79, 67 L. ed. 226.

MCCLELLAND v. CARLAND, 217 U. S. 268, 54 L. ed. 762, 30 Sup. Ct. Rep. 501.

CHICOT COUNTY v. SHERWOOD, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. ed. 546.

MORRIL v. AMERICAN RESERVE BOND Co., 151 F. 305, 313, C. C. A. 8th Circuit (1907).

NATIONAL SURETY COMPANY v. STATE BANK OF HUMBOLT, 120 F 593, 602 C. C. A. 8th Circuit (1903).

In the NATIONAL SURETY CASE, *supra*, the court said:

"This right and this jurisdiction were not conditioned by the fact that the complainants had or had not like remedies in the state court."

In the MORRIL CASE, *supra*, the court said:

". . . and no state, by conferring exclusive jurisdiction of such issues upon its own courts, by prescribing exclusive methods of commencing or of conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means, may lawfully strike down that right or take away the plenary power of the national courts to conduct the litigation, to administer their remedies, and, in the exercise of their judicial discretion, to control the possession of its subject-matter during its pendency in accordance with their established rules of practice, and finally to adjudicate the claims of the parties and to enforce their judgments."

Nor where a state statute provides a remedy, need such relief be first exhausted before seeking federal jurisdiction.

RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA ET AL *v.* DULUTH STREET RAILWAY COMPANY, 273 U. S. 625, 71 L. ed. 807.

Finally, it is submitted that there is no line of decisions, as appellants contend, that should restrain the exercise of jurisdiction by the Federal court, in a case such as this. The fact that the Chester County Trust Company may be what the Attorney General of Pennsylvania terms a "quasi-public" institution is irrelevant under the analysis of the statutes as we have presented it. For decisions like AMOS v. TRUST CO., *supra*,—while they discuss and are perhaps influenced by the fact that the corporation

is one affected with a public interest,—are primarily concerned with the fact that the State has appointed an official, as well as describing a procedure of liquidation, and it is this agent of a Sovereignty who is to be the final liquidator of the general assets of the institution. In the instant case the secretary cannot be the liquidator, but a successor to the defunct bank is to be selected by the beneficiaries of the fund or by a Court of competent jurisdiction. If Federal receivers were asked for the Banking institution itself, then appellants' argument would be in point.

There are no decisions to the effect that a Federal court, having jurisdiction, should refrain from exercising jurisdiction because the corporation for which receivers are concerned is quasi public. Indeed, there is no reason for such contention for the very fact that public interests are involved in an appeal to a Chancellor should motivate him to a more flexible exercise of power and more readily grant relief. To this effect is the following statement in Fletcher's Cyclopedia Corporations Vol. 8, p. 8855:

> "It may be said that, in determining the propriety of appointing a receiver, the nature of the corporation is usually of little or no importance, subject to the exception that (1) loss to the public may authorize the appointment of a receiver in the case of a quasi public corporation whereas no such element enters into the question of appointing a receiver for a strictly private corporation. . . "

The Pennsylvania decisions are in accord. In COWAN v. PENNSYLVANIA PLATE GLASS COMPANY, 184 Pa. 1, 38 Atl. 1075, the court said:

> "Necessarily the effect of the appointment of a receiver on the rights and remedies of creditors of private corporations must in many cases be different from that on the rights and remedies of creditors of a public

corporation. In the case of a private corporation, the public has no interest which gives it the right to be heard; any averment that will avail to create a receivership must be such as will show that a receivership is necessary to protect and promote the interest of stockholders and creditors."

B. THE BILL IN EQUITY REQUESTING RECEIVERS FOR THE MORTGAGE POOLS WAS NOT AN ACTION AGAINST THE STATE OF PENNSYLVANIA.

The Eleventh Amendment to the Constitution of the United States provides that, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State".

This amendment resulted from the decision of the Supreme Court in CHISHOLM v. GEORGIA, 2 Dall. 419, 1 L. ed. 440, which held that under Article III, Section 2, (1), of the Constitution, the Federal judicial power extended to suits against a State brought by citizens of another state.

The Eleventh Amendment was proposed by Congress on March 4, 1794, when it passed the House (4 Ann. Cong. (3rd Cong. 1st Sess.) 477), having previously passed the Senate on January 14 (Id. 30, 31). It appears officially in 1 Stat. 402. The ratifications of but six states appear among the official records printed in 2 Doc. Hist. Const. 392-407. The fifth of these (North Carolina) was on February 7, 1795. In a message by President Washington on January 8, 1795 (1 Mess. and papers of pres. 174) the ratifications of three others were announced to Congress. Rhode Island ratified at the session of its legislature held in March 1794 (R. I. Laws—(March, 1794) 32). New Hampshire's ratification occurred on June 20, 1794 (N. H.

Laws, 1785-1796, P. 501). Georgia ratified on November 29, 1794 (Dg. Georgia Laws, 1755-1800, P. 291); and Delaware ratified on January 22, 1795 (2 Del. Laws (Ed. 1797, 1199, 1200)). North Carolina was, therefore, the twelfth state (at that time there were fifteen states) and the amendment became effective on February 7, 1795. On January 8, 1798, President Adams, in a message to Congress, stated that the amendment had been adopted by three-fourths of the states (by that time there were sixteen) and might now be declared a part of the Constitution (1 Mess. and papers of pres. 260).

At the time of its adoption, the Eleventh Amendment was intended to reach only the situation found in Chisholm v. Georgia, supra, where the state of Georgia was the actual defendant. In fact, as late as 1824, when OSBORN V. BANK OF UNITED STATES, 9 Wheat 738, 6 L. ed. 204, was decided, and even later, it was held that the court would look only to the record to see who were the parties.

However, since POINDEXTER V. GREENHOW, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, was decided, it has been the practice of the court, in actions against State officers, to consider the nature of the case.

For the purposes of this brief, a careful examination has been made of the cases involving state officers decided during the past one hundred years, and the results of this study, which will now be set forth, prove conclusively that the instant suits are not against the Commonwealth of Pennsylvania.

It has been almost universally held that it is not the character of the defendant's office, but the nature of the suit or of the relief demanded, which determines whether a suit is one against a state.

A number of cases have been found in which suits against governors were allowed. So, in ROLSTON ET AL. V. CRITTENDEN ET AL., 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct.

Rep. 599, *it was held that a suit to compel the governor to do what a state statute requires him to do is not a suit against the state within the Eleventh Amendment.* Mr. Chief Justice Waite said (30 L. ed. at 728):

> "It is next contended that this suit cannot be maintained because it is in effect a suit against the state, which is prohibited by the Eleventh Amendment of the Constitution of the United States, and Louisiana v. Jumel, 107 U. S. 711 (27: 448) is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him."

And in MOTT v. PENNSYLVANIA R. Co., 30 Pa. 9, 72 Am. Dec. 664, where a statute directed that certain state property be sold at auction by the governor, the court doubted the power of the legislature to impose this duty upon him and considered that if he consented to make the sale, he would be acting ministerially and might be enjoined from making the sale subject to certain conditions prescribed by statute.

Actions against the governor of a state were held not to be actions against the state, in DAVIS v. GRAY, 16 Wall. 203, 21 L. ed. 447, and in COBB v. CLOUGH, 83 Fed. 604 (C. C., D. Minn., Third Div. 1897). In the former, the governor of Texas was made a party, and in the latter the governor of Minnesota.

In PENNOYER v. MCCONNAUGHY, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699, where the suit was held not to be an action against the State of Oregon, one of the defendants was the Governor of that State.

As has already been stated, the material fact in determining whether a suit against an officer is a suit against the state depends not upon the character of the defend-

ant's office, but upon the nature of the suit or of the relief demanded.

Where the purpose of the suit is to compel a state officer to pay the state's money on the state's obligation, or to perform a contract entered into with the State, or to do any act which affects the state's property rights, the action is one against the state. Th cases upon which appellants rely are cases in which such relief was requested, and, of course, the court refused to grant the relief.

In the instant case, however, it is obvious that the appointment of the Receivers by the United States District Court does not in any way affect any property interest of the Commonwealth of Pennsylvania, nor does it impair the State's Sovereignty.

A number of cases in which it was held that the actions were against states will now be discussed, in order to distinguish them from the instant cases.

First of all, there are the cases which arose in the Reconstruction period after the Civil War, when many Southern States enacted laws and constitutional amendments which were intended to repudiate part of the public debt. Unquestionably, the contracts entered into between the states and the bond holders were broken by these enactments, and the constitutional rights of the persons affected were violated.

Considerable litigation followed and a number of cases found their way to the Supreme Court of the United States. In most cases suit was brought against state officers, but in HANS v. LOUISIANA, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504, the action was against the defaulting state itself. Hans, a citizen of Louisiana, instituted suit in the federal circuit court for the Eastern District of Louisiana to recover the interest due upon certain state bonds held by him. The plaintiff contended "that he, being a citizen of Louisiana, is not embarrassed by the

obstacle of the eleventh amendment, inasmuch as that amendment only prohibits suits against a state which are brought by the citizens of another state, or by citizens or subjects of a foreign state". Of course, the plaintiff's contention was denied, and the court held that the action was prohibited by the Eleventh Amendment.

In EX PARTE AYERS, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216, certain British aliens filed a bill in the Federal Circuit court and obtained an injunction against the bringing of certain suits by the state's attorneys. The State of Virginia had issued bonds in 1871 and 1879 bearing negotiable interest coupons which the state contracted should be received at par in payment of taxes. In 1887 a Virginia statute was passed which forbade the acceptance of these coupons until their genuineness had been established in a suit for taxes by the state's attorneys. Ayers, the attorney-general, and others disobeyed the injunction order, and were taken into custody for contempt. A petition for a writ of habeas corpus was filed and the petitioners were discharged on the ground that allowing the injunction to stand would be enforcing the contract with the state. But Mr. Justice Matthews pointed out that (31 L. ed., at 229):

> "It may be asked what is the true ground of distinction, so far as the protection of the constitution of the United States is invoked, between the Contract rights of the complainant in such a suit, and other rights of persons and of property. In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied".

Again, (31 L. ed. at 230) the learned Justice said:

> "But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants . . . nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

The paragraph given above is quoted with approval in FITTS v. MCGHEE, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269, a case cited in the appellants' brief, and which will be discussed later.

In LOUISIANA v. JUMEL, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128, another repudiation case, where the suit was held to be one against the State to enforce a contract, Mr. Chief Justice Waite nevertheless pointed out that (27 L. ed. at 453):

> "The relators do not occupy the position of creditors of the state demanding payment from an executive officer charged with the ministerial duty of taking the money from the public Treasury and handing it over to them and, on his refusal, seeking to compel him to perform that specific duty."

The intimation is clear, from the portion of the chief justice's opinion just quoted that, in the event supposed, relief would be granted.

In the instant case, the plaintiffs have never claimed that they occupy the position of State creditors, nor are they demanding money from the public treasury; in their bills they asked only for the enforcement of a ministerial act from a ministerial officer.

In BOARD OF LIQUIDATION ET AL. v. MCCOMB, 92 U. S. 531, 23 L. ed. 623, where the Louisiana Funding Act was

again in question, and the problem of enforcing a contract against the state was once more involved, it was nevertheless held that the state officers could be enjoined from giving new bonds to the Louisiana Levee Company, under the Act of 1875, at one hundred cents on the dollar, when the claims of other creditors were refunded at sixty cents on the dollar, because such relief would not necessitate specific enforcement of the state's contract.

Murray v. Wilson Distilling Company, 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458, represents another type of case in which granting relief would require the court to compel the performance by the state of a contract obligation. This is one of the chief cases relied upon by the appellants, but the following quotation from its opinion will clearly demonstrate how patently inapplicable it is to the facts in the cases now before the court.

Mr. Justice White said (53 L. ed. at 750):

"If we consider as an original question the provisions of the Constitution of South Carolina on the subject, and the terms of the statutes of that state, establishing the dispensary system, we think it is apparent that the purchases which were made by the State officers or agents, of liquor for consumption in South Carolina, were purchases made by the State for its account, and, therefore, that the relation of debtor and creditor arose from such transactions between the State and the persons who sold the liquor. . . .

"We could not, therefore, sustain the exercise of jurisdiction by the Circuit Court without in effect deciding that the State can be compelled, by compulsory judicial process, to perform a contract obligation. It is certain that, at least by indirection, the bills of complaint sought to compel the State to specifically perform alleged contracts with the vendors of liquor

by paying for liquor alleged to have been supplied. But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a State cannot, against the objection of the State, be maintained in a Court of the United States".

Before leaving the decisions involving contracts with the state, the court's attention will be called to one case where the injunction was granted, although it meant, in effect, negative specific enforcement of the State's contract.

PENNOYER v. MCCONNAUGHY, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699.

Under an Oregon Act regarding swamp lands, applications were made for the purchase of certain lands and the money was paid, but no patents were issued therefor.

Thereafter, the legislature passed an act voiding all such contracts. Suit was brought, but the court held it was not against the State. The purpose of the suit was to restrain and enjoin the officers from selling and conveying the land in question, to which the plaintiff asserted title.

Mr. Justice Lamar (35 L. ed. at 368):

"Little remains to be done or said by us in this connection, except to apply the principles announced in the cases we have attempted to review to the facts in the case before us, as set forth in our introductory statement. In this connection, it must be borne in mind that the suit is not nominally against the governor, Secretary of State and Treasurer, as such officers, but against them collectively, as the board of land commissioners. It must also be observed that the plaintiff is not seeking any affirmative relief against the State or any of its officers. He is not asking that the State issue patents to him for the land

he claims have been purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject matter of the controversy requisite to complete his title. All that he asks is, that the defendants may be restrained and enjoined from doing certain acts which he alleges are violative of his contract made with the State when he purchased the lands."

In UTAH CONSTRUCTION CO. v. STATE HIGHWAY COMMISSION OF WYOMING, 16 F. (2d) 322, the suit was clearly against the State itself. It was there held (p. 324):

"The contract itself by its caption recites that the agreement is between the State of Wyoming acting through the state highway commission and the plaintiff."

Obviously, in the instant cases, there is no such situation. Yet the appellants rely upon the Utah case!

In INTERNATIONAL POSTAL SUPPLY CO. v. BRUCE, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820, an injunction to a patentee was denied against the use, by a Federal postmaster under the direction of the postoffice department, of an infringing machine of which the United States was a lessee in possession. In that case a distinct and acknowledged property interest of the United States was involved, yet Mr. Justice Harlan wrote a dissenting opinion in which he said (48 L. ed., at 1141):

"I am of opinion that every officer of the government, however high his position, may be prevented by injunction operating directly upon him, from illegally injuring or destroying the property rights of the citizen; and this relief should more readily be given when

the government itself cannot be made a party of record."

Although in this case an officer of the United States, and not of a state, was involved, Mr. Justice Harlan's dissenting opinion forcibly illustrates the great hesitation which members of this learned court have always experienced against concluding that a certain action interferes with the sovereignty of a government, whether state or federal.

Several cases relied upon by the appellants will now be discussed.

In FITTS v. MCGHEE, 172 U. S. 516, 43 L. ed. 535, the statute in question fixed bridge tolls and provided penalties for violations thereof. An injunction was granted by the Federal court restraining Oates, as Governor of the state of Alabama, and Fitts, as attorney-general of the state of Alabama, and others, from proceeding under the statute. Therefore, executive officers of the state of Alabama were enjoined from the performance of discretionary acts. It will be shown later that the Secretary of Banking of the Commonwealtth of Pennsylvania is a mere administrative officer, acting, so far as concerns us, in a purely ministerial capacity.

Furthermore, in Fitts v. McGhee, supra, Mr. Justice Harlan pointed out that it was not claimed by the plaintiffs that the defendants were committing a wrong against the plaintiffs' property. If that were claimed, said the learned Justice, (43 L. ed., at 541):

"... they could not resist the judicial determination, in a suit against them, of the question of the right to such possession, by simply asserting that they held or were entitled to hold the property in their capacity as officers of the state".

In LANKFORD v. PLATTE IRON WORKS Co., 234 U. S. 461, 59 L. ed. 316, Mr. Justice McKenna delivered the majority opinion (the decision was five to four) in which he held that the suit against the state banking board to compel the board to pay out of the depositors' guaranty fund or to issue a certificate of indebtedness, was a suit against the state of Oklahoma. But the distinction between that case and the instant cases is manifest. Mr. Justice McKenna referred to a decision of the Supreme Court of Oklahoma construing the statute in question, where it was held "that the depositors' guaranty fund . . . is as much a fund of the State as the common school fund".

Mr. Justice McKenna, referring to this decision, said (59 L. ed., at 320):

> "From this decision it appears that the law intended to give to the State as definite a title to the depositors' guaranty fund as to the common school fund: as definite, therefore, as the title of South Carolina to the assets of the State dispensary, which was the subject of decision in Murray v. Wilson Distilling Co."

Under the banking laws of Pennsylvania there is no possible room for a similar argument; namely, that the assets of the mortgage pools under consideration are as much funds of the Commonwealth as are recognized state funds. Nor is there any state decision similar to that of the Supreme Court of Oklahoma. But even if there were, the difference between the instant cases and the Lankford case would be unmistakable.

Even in the Lankford case, Mr. Justice Pitney, speaking for the minority of four, showed that the action was not against the State (59 L. ed., at 328):

> "For, if the action is not nominally or in effect a suit against the state, is not brought to enforce any liability or duty of the State or interfere with its property, but has for its object merely to require State officers to perform a plain official duty, not of a political nature, owing to a special class of persons, among whom the plaintiff is included it is not properly to be deemed a suit against the state within the prohibition of the Eleventh Amendment."

Again, speaking for the majority, Mr. Justice McKenna said (59 L. ed., at 319):

> "Where the State should vest the title to the fund for the purpose of its administration was immaterial to the essence of the power to create the fund. Whether the State should commit it to the *mere ministerial administration of the bank commissioner and banking board,* and subject them to controversies with depositors, or draw around them the circle of its immunity, was a matter within its competency to determine, and we are brought to the question of interpretation—which has the State done?"

To conclude the discussion of this case, if under the statute title to the fund had not been placed in the State, the action would have been allowed against the ministerial bank commission and banking board.

The appellants, as has already been stated, rely also upon UTAH CONSTRUCTION CO. v. STATE HIGHWAY COMMISSION OF WYOMING, 16 F. (2d) 322. Two brief quotations from the case, one of which has already been given above, will clearly indicate the inapplicability of that decision to those under consideration.

On page 324 the District Judge pointed out that, "The contract itself by its caption recites that the agree-

ment is between the State of Wyoming, acting through the State highway commission and the plaintiff."

And on page 326 it was said:

". . . we find that the highway construction over which the controversy arises was initiated by a constitutional amendment, which authorized the State of Wyoming to go into the road building business. The State thereupon proceeded to carry out this new function by creating an agency through which it might efficiently act. . . .

It is difficult to conceive how any function could be more clearly regarded as an act of the state itself than is the building of state highways in Wyoming."

Before leaving the clearly distinguishable cases in which it was held that the suit was against the state, we shall quote from another case of this type, Smith v. Reeves.

In SMITH v. REEVES, 177 U. S. 436, 44 L. ed. 1140, Mr. Justice Harlan said (44 L. ed., at 1142, 177 U. S., at 439):

"Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint. *This case is unlike those in which we have held that a suit would lie by one person against*

another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent." (Italics ours)

A number of cases will now be discussed in which the arguments advanced that the suits were in violation of the Eleventh Amendment were rejected by the Court.

TINDAL v. WESLEY, 167 U. S. 204, 42 L. ed. 137.

Land was purchased from State Commissioners, with the concealed purpose of making payment in revenue bond scrip, in order to have judicial determination of the question of its validity. The State officers withheld possession of the land from the purchaser.

It was held that the suit was not against the state, and that the purchaser was entitled to possession.

POINDEXTER v. GREENHOW, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903.

An action of detinue for personal property, distrained by defendant for delinquent taxes, in payment of which the plaintiff had duly tendered coupons cut from bonds issued by the state of Virginia under the Funding Act of 1871. The construction of Virginia Acts of 1882 and 1884 were involved, which required the tax payer demanding to have coupons received in payment of taxes, first to pay the taxes in money, under protest, and then to sue the officer within 30 days, and on obtaining judgment to be paid back. Held for the taxpayer.

Mr. Justice Matthews (29 L. ed., at 192):

> "The ratio decidendi in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it."

REAGAN v. FARMERS' LOAN & T. Co., 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047. This was an action by a New York corporation against the railroad commissioners of Texas and others to enjoin the enforcement of certain railroad rates established by the statutes of Texas. The Court said (38 L. ed., at 1022; 154 U. S., at 391):

> "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of the State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal Courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redresss in its own courts. *Given a case where a suit can be maintained in the Courts of the State to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal courts.*"

It was objected that the suit was in effect a suit against the State of Texas. Mr. Justice Brewer said (154 U. S., at 390, 38 L. ed., at 1021):

> "There is a sense, doubtless, in which it may be said that the state is interested in the question, but

only a governmental sense. It is interested in the well being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. *Not a dollar will be taken from the Treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered.*"

SMYTH v. AMES, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

A suit in the Circuit Court of the United States against the members of the State Board of Transportation of Nebraska and other persons and corporations, to enjoin the enforcement of certain rates established by a statute of that state for railroads. In that case it was insisted that the relief sought could only be had in an action brought in the Supreme Court of Nebraska, such being the remedy provided by the statute there in question.

The court said (42 L. ed., at 838; 169 U. S., at 516):

"*The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court is not to be conclusively determined by the statutes of the particular state in which suit may be brought.* One who is entitled to sue in the Federal Circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action."

(169 U. S., at 518; 42 L. ed., at 839):

"The answer of the officers of the State in each

case insists that the real party in interest is the State, and that these suits are, in effect, suits against the State, of which the circuit court of the United States cannot take jurisdiction. . . . It would . . . be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the circuit court has jurisdiction, not only upon the ground of the diverse citizenship or alienage of the parties. . . ."

In THE UNITED STATES v. JUDGE PETERS, 5 Cranch 115, 3 L. ed. 53, it was said by Mr. Chief Justice Marshall (5 Cranch, at p. 139, 3 L. ed., at p. 60):

"In this case, the suit was not instituted against the State or its Treasurer, but against the executrices of David Rittenhouse (Treasurer of the State of Pennsylvania), for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the Court, and prevent their looking into the suggestion, and examining the validity of the title."

(3 L. ed., at p. 61, 5 Cranch, at p. 141):

"Since, then, the State of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the District Court was pronounced, and since the suit was neither commenced nor prosecuted against that State, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited;

and, consequently, the State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause."

In UNITED STATES v. LEE, 106 U. S. 196, 27 L. ed. 171, the plaintiff claimed title to the land upon which Arlington Cemetery was established, which had passed to the Government under a tax sale that the plaintiff claimed was invalid, and brought suit against the officers in possession. The decision was for the plaintiff.

In the instant cases, neither possession nor title to the mortgage pools in question is in the Commonwealth of Pennsylvania. The Secretary of Banking merely has custody of the pools until a new fiduciary is appointed to take actual possession and title from the trust company. The Banking Code of 1933, supra, refers to the Secretary of Banking as a "Receiver", but it creates merely the status of a statutory receiver, for the purpose of indicating the State court which shall have jurisdiction over him when that jurisdiction is invoked.

In FARRELL v. STODDARD, 1 F. (2d) 802, in an application before the Federal court the Superintendent of Insurance of New York claimed that he was a New York court receiver, and before the State court he claimed that he represented an independent branch of the Sovereign power.

The Court said (p. 804):

"The defendant cannot well assert in the State court that he represents an independent branch of the sovereign power not subject to the Court's control, and in this court assert that he is the agent of the State Court, and that his custody is the custody of the court. The fact that the defendant's contentions in either court do not determine the law of the case is not overlooked. But the law, and defendant's conten-

tions in the State court, are against the defendant's contention in this court."

In ALLEN v. UNITED STATES, 285 Fed. 678 (C. C. A. 1st Circuit, 1923) it was said (p. 682):

"The contention that the district court was without jurisdiction because this is a suit against the State of Massachusetts is untenable. *The state claims no title to any of the property of the trust company held by the Commissioner and can be in no way affected by any decree that may be entered. The real defendant in this case is the trust company.*"

And on page 683, it was said:

"Here neither the State of Massachusetts nor the bank commissioner are asserting any title to the assets of the trust company."

Clearly, the State had no interest in the fund.

It is submitted that the Secretary of Banking is not an executive officer of the Commonwealth of Pennsylvania, but a mere administrative officer engaged in the performance of a ministerial duty.

THE ADMINISTRATIVE CODE OF 1929; ACT OF APRIL 9, 1929, P. L. 177, provides:

"201. *Executive Officers.* Administrative Departments, and Independent Administrative Boards and Commissions.—The executive and administrative work of this Commonwealth shall be performed by the Executive Department, consisting of the

Governor,
Lieutenant Governor,
Secretary of the Commonwealth,
Attorney General,

Auditor General,
State Treasurer,
Secretary of Internal Affairs, and
Superintendent of Instruction;
by the Executive Board and the
Pennsylvania State police;

by the following *administrative departments.*

. . . . . .

Department of Banking."

"Section 206. Department Heads.—Each administrative department shall have as its head an officer who shall, either personally, by deputy, or by the duly authorized agent or employe of the department, and subject at all times to the provisions of this act, exercise the powers and perform the duties by law vested in and imposed upon the department.

(a) The following officers shall be the heads of the administrative departments following their respective titles:

Secretary of the Commonwealth, of the Department of State;

Attorney General, of the Department of Justice;

. . . . . .

Secretary of Banking, of the Department of Banking."

ARTICLE IV, SEC. 1, OF THE CONSTITUTION OF THE STATE PENNSYLVANIA provides as follows:

"The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Secretary of the Commonwealth, Attorney General, Auditor General, State Treasurer, Secretary of Internal Affairs and a Superintendent of Public Instruction."

In addition to the sections quoted above, which prove conclusively that the Secretary of Banking is merely an administrative, and not an executive officer, there is the further fact that the Secretary of Banking is not a member of the Executive Board. The Executive Department is composed of the Governor, the State Treasurer, the Auditor General, the Secretary of Highways, the Attorney General, the Secretary of Revenue and the Secretary of Property and Supplies.

When we come to the distinction between ministerial and discretionary acts, we find that great confusion exists in the cases, so far as definitions are concerned, although usually the correct result is reached. When a court says the act is ministerial, it means that judicial control over such acts will not unduly invade other branches of the government.

The most lucid and masterly treatment of the subject is that of Edwin W. Patterson, in his article "Ministerial and Discretionary Official Acts", 20 MICHIGAN LAW REVIEW 848. On page 854, Mr. Patterson says:

> ". . . Human action always involves the exercise of some judgment or discretion.
>
> "But it may be said, 'judgment' or 'discretion' means something more than a mere mental operation; it involves intelligent choice between two courses of action, where the decision is doubtful or difficult of ascertainment. In short, the difference is merely one of degree. This explanation, while inconsistent with the dogmatic form in which the distinction is usually stated may serve to point to a class of clerical acts which are 'ministerial', such as entering figures in a book, or copying a deed into the records. That is, granted that the act is to be done, the details as to which the official exercises judgment or discretion—the kind of pen he will use, whether he will write in long hand or with a

typewriter—are such that his choice does not affect individual interests, and in this sense the 'discretion involved' in doing such an act, is so unimportant that it may be ignored. . . .

The recorder of deeds, for instance, when an instrument is presented for record, must interpret the recording act, and likewise interpret the instrument, and apply the statute to the particular facts; the Sheriff in levying on personal property must ascertain that the judgment debtor is the owner of it. The 'judgment and discretion' involved in either case is the same as that which the judges exercise when the same questions are brought before them; yet they hold that the official acts 'ministerially'. Why? Is it not because tangible property rights are affected and the controversy assumes the aspect of private litigation, the kind of questions the courts are constantly deciding, and which they consider it their province to decide finally? In other words the courts regard it as a proper case for judicial control?"

In conclusion, not one case cited by the appellants in their brief supports their contention that the actions in the instant cases were instituted against the Commonwealth of Pennsylvania. The appellants' cases deal with actions where granting relief would deprive the State as a sovereignty of property in its possession, or would require the enforcement of a contract entered into with the State.

Furthermore, the District Court, in appointing the receivers, did not substitute the receivers for the Secretary of Banking. On the contrary, the receivers were substituted for the insolvent trust company, which was incapable of continuing to act as trustee!

As has been shown, the Secretary of Banking is a mere administrative officer, in custody of these mortgage pools in which the State of Pennsylvania has no propri-

etary, or any other, interest. Manifestly, the Secretary of Banking is performing a ministerial act, an act subject to judicial control, and the Decree of the District Court only compels him to perform his duty, namely, to turn over the assets of the mortgage pools to a new fiduciary, a duty imposed upon him by the statutes of Pennsylvania.

C. THE BILLS IN THE INSTANT CASES WERE FILED ENTIRELY IN ACCORDANCE WITH SECTION 24 OF THE JUDICIAL CODE, AS AMENDED BY THE ACT OF MARCH 3, 1911, C. 231, 36 STAT. 1091, 28 U. S. C. A., SECTION 41 (1).

Article III, Section 2(1), of the Constitution of the United States provides as follows:

> "The judicial power shall extend to all cases, in Law and Equity . . . between citizens of different States."

Under the power granted by this clause of the Constitution the Congress has legislated and provided that [Section 41 (1) (Judicial Code, Section 24, amended)]:

> "The district court shall have original jurisdiction . . . of all suits of a civil nature, at common-law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . (b) is between citizens of different states . . . ."

Appellants' argument as to lack of diversity of citizenship constitutes mere surplusage. For the fact that the state has no citizenship within the meaning of Section 24 of the Judicial Code, as Amended by the Act of March 3, 1911 C. 231, 36 Stat. 1091, 28 U.S.C.A., Sec. 41 (1) is of little concern. If the state were the defendant, the eleventh amendment to the Constitution would be violated. And if

the Secretary of Banking stood in the place of the State of Pennsylvania, then the constitutional infringement might still be in issue. But these matters have been already presented.

That the State of Pennsylvania is not a citizen for the purposes of "diversity" may be conceded. That "William D. Gordon, Secretary of Banking and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company" may not be named defendants in an action brought by a non-resident in a Federal court has not been supported by appellants in their brief.

For their astounding proposition they refer to WESTBROOK v. DIRECTOR GENERAL OF RAILROADS, 263 Fed. 211 (D. C., N. D. Georgia) and they contend it was *held* in that case that,

> "When sued officially, neither the officer nor the Government is a citizen of any state. No jurisdiction on account of diverse citizenship exists in these cases."

However, the appellants are entirely mistaken, and the case stands for no such proposition. It arose under the Federal Control Act of March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Section 3115¾a et seq.), and the facts are set out in the opinion of District Judge Sibley.

(Page 212)

> "Four suits, each for $25,000, were brought in the State Court, for personal injuries and homicides inflicted during federal control, against "the Director General of Railroads of the United States, appointed by the President of the United States and acting under an act of Congress, and engaged in the operation of the line of the Louisville & Nashville Railroad Company."

"They were removed on the grounds: (1) That plaintiffs are citizens and residents of Georgia, and the Louisville and Nashville Railroad Company, to whom defendant succeeded in operating the railroads, is a citizen of Kentucky, and would before federal control have been entitled to remove for diverse citizenship; (2) that the cases arise under the Constitution and laws of the United States and orders of the Director General made in pursuance thereof, and *are controversies to which the United States are a party.*"

And on page 213 the District Judge said:

"*The Director General of Railroads* is not here sued as an individual, or even by name, but as an officer, and *stands for the United States, as both parties concede.*"

The suits, therefore, were admittedly against the United States!

The statement from Judge Sibley's opinion quoted in the appellants' brief is pure diction, absolutely unnecessary for the decision in the case, and for which the judge cited no authority whatsoever. Furthermore, the appellants cite no authority to support the statement.

There are five headnotes to the Westbrook case, but not a single one even refers to the sentences quoted in the brief of the appellants.

On the other hand, there is the RELF v. RUNDLE decision, which will now be discussed.

LIFE ASSOCIATION OF AMERICA, WILLIAM S. RELF, SUPERINTENDANT OF THE INSURANCE DEPARTMENT OF MISSOURI, AND DANIEL M. FROST, SPECIAL AGENT, ETC., v. SAMUEL E. RUNDLE, 103 U. S. 222, 26 L. ed. 337.

The Company was a Missouri corporation and the Missouri statutes provided that,

> "Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the Superintendent of the Insurance Department of this state and his successor or successors in office. . . ."

Relf commenced proceedings under the statute to dissolve the corporation and wind up its affairs. He prayed that the company be enjoined from doing business and that an agent be appointed to take charge of its property temporarily. This was on October 13.

On November 5, Rundle and wife, policy holders, commenced suit in the Fifth District Court for the parish of New Orleans, La., against the company, Frost, etc., to have the assets of the company in Louisiana declared a trust fund and applied to the claims of Louisiana creditors and policy holders in preference to others. A receiver was appointed by the State court.

On November 10th, the Company was dissolved by a decree of the Missouri court and the property was vested in Relf. On November 17, on his own motion, Relf was made a party to the suit in New Orleans, as the legal representative of the late corporation, and on November 28th he filed a petition for the removal of the case to the Circuit Court of the United States for the District of Louisiana. In his petition, he set forth his own citizenship in Missouri, and that of the appellees in Louisiana. On December 5th, the State receiver moved to dismiss the cause and strike it from the docket of the circuit court, among other reasons, "because Relf had no standing in court, he being a creature of the State of Missouri, without capacity to sue or remove causes in Louisiana". The cause was remanded, but on

appeal, the order was reversed. On Page 339, 26 L. ed., Mr. Chief Justice Waite said:

> "He (Relf) is an officer of the State and as such represents the State in its sovereignty while performing its public duties."

Nevertheless, in that capacity he was held to have citizenship for the purposes of diversity of citizenship jurisdiction. The State of Missouri itself could not have sued in the Federal court, because no Federal question was involved, and because a state has no citizenship for purposes of jurisdiction based upon diversity of citizenship.

The learned Chief Justice said further: (26 L. ed. 339)

> "...as he appeared in time and was a citizen of Missouri...he was entitled to remove the cause and require citizens of Louisiana to litigate their claims with him in the Courts of the United States."

It is submitted that every type of officer has citizenship, but that where the suit is clearly against the State, his citizenship is immaterial.

It is submitted further that whether suing or sued as an individual or officially, the citizenship of an officer is his natural citizenship. RELF v. RUNDLE, *supra*.

The appellants cite HERTZ v. KNUDSON, 6 F. (2d) 812 (C. C. A. 8, 1925). There it was held that the State of Nebraska was the party in interest, and that, therefore, the Federal court did not have jurisdiction in a suit by Knudson, deputy and acting Secretary of Trade and Commerce. The suit was originally brought alleging that the state was the party plaintiff, the complaint containing the following allegation: (P. 814)

> "That the grounds upon which this court's juris-

diction depends are the fact that *the plaintiff is the State of Nebraska*, and the defendants are citizens of another state, and that the amount involved in the suit is in excess of the sum of three thousand ($3,000) dollars."

To show diversity of citizenship, Knudson tried to substitute himself as plaintiff. The court pointed out that the state was the plaintiff, that no Federal question was involved, and dismissed the suit.

In UTAH CONSTRUCTING CO. v. STATE HIGHWAY COMMISSION, *supra*, not only did the contract itself recite that the agreement was between the State and the plaintiff, but the State had gone into the business of constructing highways, and was certainly the real party in interest.

There are a great many cases involving suits against officers where the question of lack of diversity of citizenship was not raised or discussed. Surely, the only rational answer is that it msut have been realized how unsound any such proposition would be.

It is submitted that the suits in the instant cases were entirely in accordance with the Judicial Code.

In conclusion, from some sources has come the demand that the diversity of citizenship jurisdiction of the Federal courts be abolished, or restricted in all possible ways. Not only does such a course require Congressional legislation, but in the language of Mr. Robert C. Brown, in 78 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 179, at 193:

> "If as has been shown, the exercise of this (diversity of citizenship) jurisdiction is rendering a valuable service to the country as a whole, then, if the burden of the Court is too great, the proper solution lies in an increase in the number of courts."

CONCLUSION.

It is respectfully submitted that the Federal court had jurisdiction in this litigation and that the appointment of receivers was a proper exercise of that power. The District Court opened every channel for the Department of Banking to present substantial reasons why the court should not exercise jurisdiction. The Department of Banking took the position that the court did not have jurisdiction over the res, for the reason that the statutes of Pennsylvania made the Secretary of Banking responsible only to the court in which the certificate of possession was filed and that the filing of such a certificate conferred jurisdiction upon the state court. The bill averred inter alia the consequences which would surely follow, in an unsettled real estate market, from failure to diligently pursue the collection of interest on mortgages and to compel the payment of taxes and to devote constant supervision to the real estate. The bill averred that little effort was being made by the Secretary of Banking to fulfill these requirements. These averments remained unchallenged. Only the right of the District Court to exercise jurisdiction was placed in issue by them. Under these circumstances, it is submitted, the Federal Court would have abused its discretion not to act and appoint the receivers as requested.

The power of a Federal Court in a proper case to appoint receivers for a defunct corporation upon the application of a non-resident is conceded. It is contended by appellants that the statutes of Pennsylvania providing for the liquidation of banks preclude such jurisdiction because the state court has jurisdiction over the res and secondly, providing a complete machinery for liquidation, should as a matter of policy require a Federal Court (even if it had jurisdiction) to refrain from its exercise. The second reason will be disposed of at the outset.

We have presented a complete statement and an analysis of the Pennsylvania Banking Acts. That they may set

up a complete mechanism for the liquidation of the *general assets of a bank* need not be contraverted for such a system is irrelevant to our problem. The argument must isolate itself to the specific res involved. It so happens that in Pennsylvania trust companies were creating a form of investment by participation in mortgage securities. This never formed a part of the general banking business and the Legislature of Pennsylvania in providing for the liquidation of banks took cognizance of this fact. It was, therefore, provided that in liquidating banks such funds comprising mortgage pools be set aside and the beneficiaries of the pools be notified to remove them from the bank and dispose of them as they please. Definitely then, there is no state official to liquidate this fund and accordingly a well grounded principle that would restrain a Federal Court from interfering with a statutory official in the performance of a system of liquidation has no application in the instant case.

It is next contended by appellants that the state court exercised jurisdiction over the mortgage trust pool prior to the filing of the bill in equity in the Federal Court. This argument is based upon the fact that the Secretary of Banking filed a certificate of possession with the Prothonotary of Chester County. This was carefully considered by the courts below and conclusion drawn from logic and precedent that such a ministerial act can amount to no more than notice to the county of the fact that the Secretary of Banking has taken possession of an insolvent institution. The failure to file such a certificate of possession would not affect the possession by the Secretary of Banking. No court could interfere with his possession. It is certain that such procedure does not conform to the principle resolved from innumerable decisions to the effect that a court is not exercising jurisdiction unless it has dominion of the res, and that may only be obtained by some actual act of dominion. That the Pennsylvania statutes may make

the Secretary of Banking responsible only to the state court is proper legislation providing it does not deprive a litigant, not subject to the laws of Pennsylvania, of another existing remedy. And the query may well be raised whether such exclusive remedy was contemplated by the Legislature as to these mortgage pools inasmuch as such funds are placed outside the scope of the Secretary's liquidations. In any event, it is well established that a state statute may not limit the right of a non-resident to seek relief in a Federal Court.

The position taken by the Department of Banking in this case is nebulous indeed. The Secretary of Banking is an administrative officer under the "Administrative Code" who has a duty of protecting this fund until the beneficiaries repossess it. The State of Pennsylvania, of course, has no proprietary interest to protect. If the Supreme Court should reverse the decrees appointing receivers, the Secretary of Banking would not proceed to liquidate the fund. Yet that is the very thing which did happen in all of the cases cited by appellant. On the contrary, if the federal receivers were removed, these mortgage trust pools would be turned over to fiduciaries or receivers to be appointed by the Chester County Court. Is this appellants' actual contention?

The District Court in appointing receivers, and the Circuit Court of Appeals in upholding that action, did so only after long deliberation and a careful study of the situation. That they concluded complainants were properly before them and seeking a relief which should be granted, it is submitted, was the only equitable determination.

Respectfully submitted,

DAVID BORTIN,
1622 Chestnut Street,
Philadelphia, Pa.,
HIRSCHWALD, GOFF & RUBIN,
Counsel for Appellees.

APPENDIX.

PERTINENT PENNSYLVANIA BANKING LEGISLATION.

The Banking Act of 1923, Act of June 15, 1923, P. L. 809, as Amended by Act of May 5, 1927, P. L. 762.

Section 22. *Certificate of Taking Possession.*—When the Secretary shall have duly taken possession of the business and property of a corporation or person as provided in section twenty-one of this act,[1] he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall index the same in the judgment index under the name of the corporation or person as defendant and the name of the Secretary as plaintiff.

From and after the filing of such certified copy in the office of the prothonotary, the Secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person.

. . . . . .

Section 40. *Trust Funds*—

(a) Taking Possession by Secretary.—Whenever the secretary takes possession of the business and property of a corporation or person in accordance with the provisions of this act, he shall also take possession of all funds, property, and investments held by such corporation or person in any fiduciary capacity, but shall keep the same separate and apart from the assets thereof.

(b) Substituted Fiduciaries.—Upon determining to liquidate the affairs of such corporation or person, the sec-

retary shall forthwith give written notice to all parties interested in any such funds, property, or investments held in a fiduciary capacity, so far as such notice is practicable, requiring them within thirty days to apply to the proper court or official for the appointment of substituted fiduciaries to take the place of such corporation or person. On the failure or neglect of the parties so notified to make such application within the time designated, or in case the parties in interest cannot be notified, the secretary shall himself apply for such appointment of substituted fiduciaries.

(c) Settlement Without Accounting.—In any instance where there shall be no dispute as to the amount or identity of such funds, property, or investments, and all parties in interest are sui juris, and so request in writing, the secretary may, without filing of an account, transfer, pay over, and deliver to such substituted fiduciary a receipt and release in full, which shall discharge the secretary and such corporation or person from any further liability in the premises.

(d) Jurisdiction of Disputes as to Identity of Trust Fund. In any instance where there shall be a dispute as to the identity of alleged trust funds, property, or investments, either because the same have become or are alleged to have become mingled with other funds, property, or investments, or otherwise, the court having jurisdiction of the liquidation proceedings shall have exclusive jurisdiction to determine such dispute.

(e) Accounting.—In all other instances, the secretary shall, with the least possible delay, prepare and file in the courts having jurisdiction thereof the accounts of such corporation or person in such fiduciary capacities, and shall transfer, pay over, and deliver the balances, determined upon such accounts to be due, in accordance with the orders and decrees of such courts.

Act of Pennsylvania of May 15, 1933, P. L. 565.

Section 604. *Certificates of Possession; Filing.—A.* The Secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of the Department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the Secretary, pursuant to the provisions of this act, appoints to take charge of the affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the Secretary does not appoint a deputy receiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an additional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession.

B. The Secretary shall file the original certificate of possession and the original of any supplement thereto in his office in Harrisburg, and the duplicate certificate of possession and the duplicate of any supplement thereto in the office of the prothonotary. The certificate of possession filed in the prothonotary's office, and any supplement thereto, shall be listed in the judgment index in the name of the institution as defendant and of the Secretary as plaintiff.

C. In addition the Secretary shall, as soon as possible, file a certified copy of the certificate of possession, and of any supplement thereto, in the office of the recorder of deeds in each county in the Commonwealth, or with the proper official in any other state or country, in which any real property shall be situated which belongs to the institution or title to which is in its name, or upon which there is a mortgage or other lien which belongs to the institution or title to which is in its name. Such copy shall be recorded

in the current deed book, and shall be indexed in the grantors' index in the name of the institution and in the grantees' index in the name of the Secretary, or it shall be filed, indexed, or registered by whatever other method is provided by the law of the particular county, state, or country in which such real property is located.

Section 712. Liens, Judgments, and Executions; Assignments of Claims.—A. The status of all parties shall become fixed on the date the Secretary takes possession of the business and property of the institution, as receiver.

. . .

ARTICLE IX.

Secretary in Possession of a Mortgage or Security Pool or of an Asset in Which Undivided Interests Are Held.

Section 901. *Mortgage and Security Pools and Participations; Accounts.*—Whenever the Secretary shall have filed a supplement to the certificate of possession, setting forth his determination to liquidate the affairs of an institution of which he is in possession as receiver, he shall, as soon as it may be convenient, file, in the court in which the certificate of possession shall have been filed, an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by such institution, or as to any mortgage, security, or other asset, in which undivided interests shall have been created by the institution, regardless of whether certificates of participation in such mortgage or securities pool, or in such mortgage, security, or other asset shall have been actually issued by the institution, and regardless of whether the relation of the institution to the owners of the undivided interests in such mortgage or securities pool, or in any such mortgage, security, or other asset, is technically that of a trustee.

A mortgage or securities pool shall be regarded as

having been operated by the institution, regardless of whether any or all of the mortgages, securities, or other assets in such pool shall be held in the name of the institution or in the name of the nominee of the institution. Where undivided interests have been created in any mortgage, security, or other asset by any corporation or person holding such mortgage, security, or other asset as nominee of the institution, such undivided interests shall be regarded as having been created by the institution.

The prothonotary shall not be under any duty to recopy or otherwise record any such account filed by the Secretary. He shall make no charge except the regular fee for filing such or similar papers.

Section 902. *Transfer of Pools and Participations Without Filing an Account.* If all the corporations or persons who are the owners of all the undivided interests in any mortgage or securities pool, or in any mortgage, security, or other asset in which the institution shall have created undivided interests, are sui juris, and if they shall agree to the amount asserted by the Secretary to be due him as receiver for services rendered by the institution or by him, and for expenses incurred by either, and if they shall authorize the Secretary to transfer any such mortgage or securities pool, or any such mortgage, security, or other asset to them, or to a substituted fiduciary or to any other corporation or person agreed upon by them, and if they shall execute proper instruments releasing the Secretary and the institution from any further liability to them, the Secretary may transfer to such substituted fiduciary or to such corporation or person, without filing an account, all the mortgages, securities, or other assets comprising such mortgage or securities pool or the mortgage, security, or other asset in which undivided interests have been created. In any case where the institution, as fiduciary of an estate, is the owner on behalf of such estate of any undi-

vided interest in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and no substituted fiduciary has been appointed for such estate, the Secretary shall not transfer such mortgage or securities pool, or such mortgage, security, or other asset in which undivided interests were created by the institution, unless he shall also be authorized to make such transfer by all corporations or persons having an interest in the estate of which the institution was fiduciary, except that where substituted fiduciaries have not been appointed for unborn beneficiaries of the estate or for other beneficiaries who are not sui juris, the Secretary shall not be required to obtain such authority from any one in behalf of such unborn beneficiaries or other persons who are not sui juris.

Section 903. *Notice of Filing Account. A.* Upon filing an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by an institution of which he is in possession as receiver, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the Secretary shall give notice thereof, in so far as it may be practicable, to all corporations or persons who are the owners of the undivided interests in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and, in any case where the institution as fiduciary of an estate, is the owner on behalf of such estate of any such undivided interest, then to all corporations or persons having an interest in such estate, except that no such notice need be given to anyone on behalf of unborn beneficiaries of such estate or other beneficiaries who are not sui juris, where no substituted fiduciary has been appointed for such beneficiaries. Such notice shall be given to the corporations or persons entitled thereto under this section, at their addresses as they appear on the books or other records of the institution, or, if the address of any

such corporation or person does not appear thereon, then at the last known address of such corporation or person.

B. Such notice shall state the time and place of the audit of such account, and, except where an application for a substituted fiduciary shall have been made by any other method authorized by this act, it shall also state the intention of the Secretary to apply for a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, and the time and place of any hearing upon such application which may be fixed by the court.

Section 904. *Appointment of Substituted Fiduciary; Transfer of Pools or Participations upon Order of Court.* —*A.* After the filing by the Secretary of a supplement to the certificate of possession, setting forth his determination to liquidate the business and property of an institution, but either before or after the filing of an account by him as to any mortgages, securities, or other assets comprising any mortgage or securities pool, operated by such institution, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the owner of any undivided interest in such mortgage or securities pool, or in such mortgage, security, or other asset, may file, in the court in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created.

If such petition shall not have been filed by the owner of any such undivided interest within thirty days after the notice by the Secretary of the filing of an account as to such mortgage or security pool, or as to such mortgage, security, or other asset, the Secretary shall file, in the court

in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for any such mortgage, security, or other asset in which undivided interests were created by the institution.

Upon the filing of such a petition by the owner of any such undivided interest, or by the Secretary for such mortgage or security pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, the court shall, upon a day fixed by it, conduct a hearing upon such application, after which it shall appoint a substituted fiduciary.

B. The Secretary shall transfer to the substituted fiduciary appointed by the court all such mortgages, securities, or other assets comprising any such mortgage or securities pool, or any such mortgage, security, or other asset in which undivided interests were created, as are in his possession as receiver, and as to which he shall have filed an account. The substituted fiduciary shall take such mortgages, securities, or other assets without liability for the nature or value of the mortgages, securities, or other assets as investments. Such transfer shall be made in accordance with the order of the court, and, in directing such transfer, the court may reserve for future determination any question of surcharge against the institution or the Secretary.

The court may, after petition filed pursuant to the provisions of this section, order the Secretary to make such transfer even prior to filing an account, in which case it may also reserve for future determination any question which may arise upon the audit of the account.